ORIGINAL

NO. 82842-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN DOLAN and a class of similarly situated individuals,

Respondents,

v.

KING COUNTY, a political subdivision of the State of Washington,

Appellant.

BRIEF OF ~~APPELLANT~~ PETITIONER KING COUNTY

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A. INTRODUCTION

Simply because a government agency contracts for public services with a private, nonprofit corporation and exercises appropriate budgetary oversight over the expenditure of public monies for those services does not transform the employees of the nonprofit corporation into public employees or convert the corporation into a de facto government agency for purposes of the Public Employees Retirement System ("PERS"), RCW 41.40.

Four private, nonprofit corporations ("the corporations") contract with King County to provide public defense services. The corporations' employees are not public employees eligible for enrollment in PERS, nor are the corporations de facto County agencies. King County does not control the work of the corporations' employees within the meaning of traditional common law master-servant principles under RCW 41.40.010(22) and WAC 415-02-110. Moreover, the corporations are not public agencies created by the Legislature or the King County Council. The corporations fail to meet the definition of a PERS employer. RCW 41.40.010(4)(a).

Under the trial court's articulated rationale for making the class members PERS-eligible, virtually any employee of government contractors in Washington would become PERS-eligible and numerous

contractors would become de facto government agencies. This was never intended by the Legislature in enacting PERS and would literally bust local and state budgets.

In addition, the employees here are estopped from claiming they are public employees for purposes of PERS because their status has been litigated. Moreover, the employees have sought and obtained benefits available only to private, not public, employees. Finally, some of the corporations' employees have organized into unions subject to the jurisdiction of the National Labor Relations Board ("NLRB"). The NLRB has no jurisdiction over public employees.

The corporations' employees are not eligible for PERS benefits.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its written decision on February 9, 2009.

2. The trial court erred in making finding of fact number 1.

3. The trial court erred in making finding of fact number 2.

4. The trial court erred in making finding of fact number 3.

5. The trial court erred in making finding of fact number 8.

6. The trial court erred in making finding of fact number 9.

7. The trial court erred in making finding of fact number 13.

8. The trial court erred in making finding of fact number 14.

9. The trial court erred in making finding of fact number 15.

10. The trial court erred in making finding of fact number 16.

11. The trial court erred in making finding of fact number 17.

12. The trial court erred in making finding of fact number 18.

13. The trial court erred in making finding of fact number 21.

14. The trial court erred in making finding of fact number 25.

15. The trial court erred in making finding of fact number 29.

16. The trial court erred in making finding of fact number 32.

17. The trial court erred in making finding of fact number 33.

18. The trial court erred in making finding of fact number 34.

19. The trial court erred in making finding of fact number 39.

20. The trial court erred in making finding of fact number 47.

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24. The trial court erred in making finding of fact number 54.

25. The trial court erred in making finding of fact number 55.

26. The trial court erred in making finding of fact number 56.

27. The trial court erred in making finding of fact number 57.

28. The trial court erred in making finding of fact number 58.

29. The trial court erred in making finding of fact number 59.

30. The trial court erred in making finding of fact number 60.

31. The trial court erred in making finding of fact number 61.

32. The trial court erred in making finding of fact number 62.

33. The trial court erred in making finding of fact number 63.

34. The trial court erred in making finding of fact number 64.

35. The trial court erred in making finding of fact number 67.

36. The trial court erred in making finding of fact number 68.

37. The trial court erred in making finding of fact number 69.

38. The trial court erred in making finding of fact number 73.

39. The trial court erred in making finding of fact number 75.

40. The trial court erred in making finding of fact number 76.

41. The trial court erred in making finding of fact number 83.

42. The trial court erred in making finding of fact number 94.

43. The trial court erred in making finding of fact number 99.

44. The trial court erred in making finding of fact number 100.

45. The trial court erred in making finding of fact number 105.

46. The trial court erred in making finding of fact number 106.

47. The trial court erred in entering conclusion of law number 1.

48. The trial court erred in entering conclusion of law number 2.

49. The trial court erred in entering conclusion of law number 3.

50. The trial court erred in entering conclusion of law number 4.

51. The trial court erred in entering conclusion of law number 5.

52. The trial court erred in entering its order granting an injunction on April 17, 2009.

(2) Issues Pertaining to Assignments of Error

1. Do the employees of the corporations with whom King County contracts meet the definition of employees within the meaning of RCW 41.40.010(22) and interpretive regulations of the Department of Retirement Systems ("DRS") such that the County must enroll them in PERS? (Assignments of Error Numbers 1, 18, 26, 29, 34-37, 40-41, 44, 47-48, 50, 52)

2. Are the corporations with which King County contracts de facto public agencies, thereby meeting the definition of "public employer" in RCW 41.40.010(4)(a), requiring their employees to be enrolled in PERS? (Assignments of Error Numbers 1-44, 47-52)

3. Are the employees estopped from claiming they are public employees where prior litigation has determined the employees of one of the corporations are not PERS-eligible, they have chosen retirement benefits available only to private employees, they have organized in labor organizations subject to NLRB jurisdiction, and the NLRB does not have jurisdiction over public employees under 29 U.S.C. § 152(2)? (Assignments of Error Numbers 1, 16, 17, 45-47)

C. STATEMENT OF THE CASE

The basic facts in this case are largely undisputed.

In King County, indigent criminal defense services are and have historically been provided by private, independent public defender corporations who contract with the County to provide such services.[1] CP 5464. The corporations employ their own attorneys, investigators, paralegals, social workers, and other staff. *Id.* The County established the Office of Public Defense, a division of the County's executive branch, to negotiate and administer its public defense contracts. *Id.*; CP 3659.[2]

The use of independent corporations to provide indigent criminal defense services was extremely important to the founders of the County's

[1] King County, like other local governments, provides services to defendants who demonstrate financial need for such services. RCW 10.101.030; King County Code § 2.60.010.

[2] In 2002, the name of King County's Office of Public Defense was changed to the Office of the Public Defender. CP 5464. The term "OPD" refers to either.

defender system, to the leaders of the newly formed corporations, to members of the bench and bar, and to County officials. CP 5449. After researching existing public defense systems around the country, those groups came to believe that governmental entities could have significant and unwanted control over the employees they hired and the decisions they made for clients. *Id.* Corporate independence was thus their highest priority. *Id.*

(1) The Public Defender Corporations

(a) The Defender Association ("TDA")

TDA is a nonprofit, tax exempt[3] corporation founded in 1969 by a group of Seattle attorneys and community activists. CP 2792, 5448, 6097, 6176-77, 6278-99. It initially provided public defense services to the City of Seattle. CP 2792, 5448. In 1970, it negotiated the first contract to provide public defense services to King County. CP 2792. It continues to contract with the County and the City of Seattle. CP 3107-08.

TDA is governed by an independent board of directors and operates pursuant to its own bylaws. CP 1267-68, 2968-70, 6177, 6278-99. The board does not include County employees. CP 1268, 2969-70. TDA has an office in Seattle near both the Seattle Municipal and King County Superior courthouses, and an office in Kent. CP 3105. It employs

[3] Internal Revenue Code, 26 U.S.C. § 501(c)(3).

approximately 80 attorneys representing more than 11,000 clients per year in felony, misdemeanor, juvenile, family advocacy, and civil commitment cases, and handles a number of appeals at all levels of the state courts. CP 6177. It also employs a staff of professional investigators, social workers, paralegals and clerical employees. *Id.*

All non-supervisory attorneys and staff who work for TDA are members of the Service Employees International Union Local 925 ("SEIU"). CP 2793, 3093-94. TDA and SEIU entered into their most recent collective bargaining agreement for 2004 through 2008 after lengthy negotiations. CP 3093, 5183-5225. King County did not participate in those negotiations. CP 2793-94, 3094.

The collective bargaining agreement between TDA and SEIU governs most aspects of the employment relationship. CP 3094-95, 5183-5225. The NLRB has jurisdiction over TDA as the private employer of the employees in the bargaining unit, all of whom are members of the certified class in this case. CP 90, 5188, 5224-25.

(b) Associated Counsel for the Accused ("ACA")

ACA is a private, nonprofit corporation formed in 1973 to provide legal services to indigent criminal defendants; shortly thereafter, it entered into its first public defense contract with King County. CP 6172, 6186-90. ACA is one of the two largest corporations providing indigent defense

services in King County. CP 2820. ACA considers itself the "primary public defender for King County and the City of Seattle." CP 2843, 6172. ACA operates pursuant to its articles of incorporation and bylaws. CP 4829-41. It is governed by an independent board of directors whose members are not County employees. CP 2819-20, 3151.

ACA maintains offices in both Seattle and Kent. CP 6172. It primarily provides services to people accused of crimes or subject to involuntary commitment. *Id.* It also provides services to people in need of legal help in drug court, juvenile court, and mental health court, and in dependency and contempt cases. *Id.* It currently employs approximately 90 attorneys and 50 or more investigators, paralegals, and other non-attorney staff. CP 2821, 6173-74. ACA does not contract exclusively with King County because it also contracts with the City of Seattle to provide public defense services to defendants with cases in Seattle Municipal Court and Seattle Mental Health Court. CP 2843, 2845, 6172. ACA employees are not unionized; all of its employees are at-will. CP 4873.

(c) Society of Counsel Representing Accused Persons ("SCRAP")

SCRAP is a private, nonprofit public defense law firm with offices in Seattle and Kent. CP 3062, 6036, 6182. It was founded in 1976 to

provide representation to indigent minors accused of misdemeanor and felony offenses, and to parents and minors in abuse and neglect dependency cases. CP 2873-74, 3301, 6182. To further its mission, SCRAP has entered into partnerships with local human service agencies and neighborhood groups to provide mentoring and legal representation to at-risk youth of color. CP 6182. SCRAP operates pursuant to its articles of incorporation and bylaws. CP 3965-80. It is governed by an independent board of directors whose members are not County employees. CP 3062, 3301.

SCRAP now employs more than 90 people, including attorneys, investigators, paralegals, social workers, and clerical and administrative staff. CP 2880-81. Its employees are employed at-will and are not unionized. CP 2881, 2914, 3183.[4]

(d) Northwest Defenders Association ("NDA")

NDA was formed in 1988 to defend indigent clients against adult and juvenile criminal charges and to represent children and parents in dependency proceedings. CP 5973, 6180. NDA operates pursuant to its

[4] In 1996 and again in 1999, Teamsters Local 117 attempted unsuccessfully to organize SCRAP's non-attorney staff. CP 2877-78, 6413-21. The NLRB held elections in those years, but the union lost both times. *Id.*

articles of incorporation and bylaws.[5] CP 3676-3701, 6192-6255. It is governed by an independent board of directors whose members are not County employees. CP 3121-22.

NDA currently employs approximately 50 people, half of whom are attorneys and half of whom are paralegals, investigators, social workers, and other support staff. CP 2987. SEIU, Local 925 currently represents all of NDA's non-managerial "attorneys, paraprofessionals, investigators and clerical employees." CP 2997, 3714-35. SEIU membership is a condition of employment for all NDA employees in the bargaining unit. CP 3716.[6] For more than ten years, the NLRB has asserted jurisdiction over NDA as the employer of the employees in this bargaining unit, all of whom are part of the certified class in this case. CP 90, 3716, 6426.[7]

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[5] Throughout the years, NDA has amended or restated its articles of incorporation a number of times to clarify that it was organized to qualify as a tax-exempt organization within the meaning of Section 501(c)(3) of the Internal Revenue Code. CP 6199-6202, 6220-47.

[6] NDA staff members were previously represented by SEIU, Local 6. CP 6426-30. The NLRB certified SEIU, Local 6 as the exclusive representative of all NDA employees in the bargaining unit on April 25, 1995. CP 6432-33. NDA and SEIU negotiated for more than two years before finalizing their first collective bargaining agreement. CP 2997-98. The agreement has been renegotiated every three years. CP 2998. King County has never participated in the negotiations between NDA and SEIU. *Id.*

[7] The Board has twice certified the union as the employees' exclusive bargaining agent and has investigated unfair labor practice charges filed by SEIU. CP 6432-53.

In two cases involving former NDA employees, separate Washington courts have already determined NDA employees are not County employees. In *White v. Northwest Defenders Ass'n* (King County Cause No. 94-2-09128-0), a former NDA attorney filed a lawsuit against NDA and King County alleging NDA discriminated against him based on race. CP 546. The attorney also alleged the County was liable for NDA's discriminatory acts because NDA was not an independent contractor but an agency of the County. *Id.* The superior court granted King County's summary judgment motion, rejecting the attorney's claim that the County was his employer. *Id. See* Appendix.

In *Larranaga v. Northwest Defenders Ass'n*, two former NDA attorneys filed a lawsuit in state court seeking a retroactive wage increase and benefits that had been negotiated by NDA and SEIU, Local 6. CP 546. Following removal of the case to federal court, the United States District Court for the Western District of Washington concluded the attorneys' claims were preempted by the National Labor Relations Act ("NLRA") based on the NLRB's assertion of jurisdiction over the employment relationship between NDA and the union. *Id. See* Appendix. The Ninth Circuit Court of Appeals affirmed the district court's decision in a memorandum opinion issued in 2001. 4 Fed. Appx. 391, 392, 2001 WL 133139 (9th Cir. 2001).

In 2002, a County contract compliance audit of NDA revealed that NDA had materially breached its public defense contract with the County. CP 3117, 3659-74.[8] NDA's most significant breaches included the lack of legitimate board oversight and governance and the improper use of contracted public funds to operate a private, for-profit law firm. CP 3662-64, 3667-68. The auditor concluded that mismanagement of NDA had adversely impacted its financial integrity and jeopardized its future ability to provide public defense services. CP 3670.

Based on the audit report, the County filed a lawsuit against NDA, its then-executive director, and several members of its board of directors alleging violations of the Washington Nonprofit Corporation Act and breach of contract. CP 3632-57. The County sought to remove the directors and any management or staff who knowingly participated in the mismanagement of NDA, to have the court appoint a receiver to manage NDA until a properly constituted board could be appointed and new management installed, and to recover any misappropriated public funds. CP 3656-57. Alternatively, the County asked the court to cancel the contract or order NDA dissolved. CP 3657. The court placed NDA into receivership and appointed Jeffery Robinson to serve as the receiver. CP

[8] The audit was initiated following an anonymous report that the then-current executive director had violated the terms of the contract and was engaging in the private practice of law for profit with public funds. CP 3634, 3659. The audit was conducted to determine whether NDA was properly managing and disbursing public funds. *Id.*

3116-17, 5375-82.[9] Robinson successfully guided NDA through the receivership process and restored its independence.[10] CP 3121, 5439-42. As a result of the NDA experience, King County made a number of changes in its public defense contracts. *Compare* CP 3415 *with* CP 3530.[11]

(2) Corporate Formation, Governance, and Activities

Each corporation is an independent 501(c)(3) nonprofit corporation based in Washington whose articles of incorporation validate its nonprofit status. CP 6183-6299. This status is confirmed each year when the corporations file their respective Form 990s with the Internal Revenue Service. CP 5903-6168. Each corporation operates according to its own bylaws, which were approved by the corporation's board of directors. CP 2968, 3690-3701, 3972-85, 4835-44. Some of the corporations have

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[9] The Court of Appeals affirmed, holding the order appointing the receiver was fully authorized because NDA had forfeited its corporate rights and the appointment was necessary to secure ample justice to the parties. *King County Dep't of Community & Human Services v. Northwest Defenders Ass'n*, 118 Wn. App. 117, 126, 75 P.3d 583 (2003).

[10] Subject to court approval, Robinson identified new board members, employed an interim director, hired consultants to evaluate NDA's financial practices, and revised NDA's articles and bylaws. CP 3118-20. In 2003, the court terminated NDA's receivership; thereafter, it again functioned like the other corporations. CP 2984-85, 3121-22. As a result of the lawsuit, NDA was required to repay the County $141,588 in misappropriated public funds. CP 3137, 5427-31.

[11] The County instituted requirements regarding board meetings, a prohibition against staff serving on the boards of directors, and increased financial auditing and supervision. CP 3135, 4447-68, 5363.

developed their own strategic plans. CP 2899, 3035.[12] They work independently of each other and provide different services to different client groups and governmental units. CP 2843-44, 2881, 2884, 3107-08.

Independent boards of directors govern each corporation. CP 3059. Board members are private citizens, not County employees. CP 2819-20, 2969-70, 3122, 3151. The County does not direct or participate in the election of board members. CP 2899, 2969-70, 3062-63, 3148, 3151.

Each board is responsible for setting its overall corporate policy. CP 2971, 3124, 3690, 3973, 4835. Some of the corporations have mission statements that guide their policies, procedures, and services. CP 2885-86, 3182, 3296. Each corporation believes it has a somewhat unique mission. For example, some are more focused on direct-service, while others spend more time and effort on national criminal law projects. CP 2799-2800, 2846, 2945-46. The County has never directed, controlled, or approved the creation or revision of a corporation's mission statement. *See, e.g.,* CP 2885-86, 3386.

Each board hires its own executive director and sets the terms and conditions of the director's employment, including salary, benefits, and length of employment. CP 2970-71, 3064-65, 3124, 3697, 3977, 4837.

[12] OPD does not require or approve a strategic plan. CP 2899.

Each executive director serves at the will of his or her respective board. CP 3697, 3977, 4837. The County does not participate in the boards' hiring decisions. CP 2819-20, 2899, 2969-71, 3062, 3122, 3151, 3989.

The executive directors work with their respective boards to develop their annual corporate budgets. CP 2829, 2889-90, 2898-99, 3098, 3383, 3989, 4720, 5286. Each executive director, in conjunction with his or her respective board, selects or hires an audit firm to conduct the independent financial audits required by the County's public defense contracts. *See, e.g.,* CP 2888, 3107. The directors are responsible for managing day-to-day corporate operations according to the strategic visions established by their respective boards. CP 2848-49, 2971, 2989, 3084-85, 3124, 3697, 3977, 4837. In managing day-to-day operations, they select the location of their offices and negotiate their own property leases. CP 2566, 2834, 2891, 2995, 3105, 3391, 3703. The County does not dictate where the corporations locate their offices, nor does it mandate the amount of office space selected. *See, e.g.,* CP 2566, 2843. The corporations develop their own policies related to the use of corporate equipment and supplies. *See, e.g.,* CP 2891, 2893, 3106, 3393-98.

Each corporate board ultimately decides on an annual basis whether to contract with King County or, for that matter, with the City of Seattle or any other municipality needing public defense services. CP

2973, 3066, 3126, 4431, 4538, 5535. The contracts with the County are not exclusive.[13]

Each board also has the discretion to design its own organizational structure, to create internal units based on the types of cases assigned, and to allocate attorneys, investigators, and other staff to those units. CP 2853, 2901, 2989, 4843, 4858. The County has no control over the corporations' internal structures and is not involved in the assignment of staff to the different internal units. CP 2853, 2899, 2901, 2924, 3027-28, 3085-86, 3088. At least two of the corporations (SCRAP and ACA) have conducted substantial reorganizations, which included the reclassification of staff and the reorganization of job duties. CP 2853, 2875-76, 2901, 3390, 3982-84, 4859, 5025-5164. The County did not order those reorganizations and did not participate in the internal meetings that were held to discuss them. CP 2853.

Each executive director has the discretion to make hiring decisions. CP 2854, 2879-80, 2902, 2904-05, 3027, 3089, 3091, 3990, 4351-52,

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[13] ACA contracts with the City of Seattle to provide indigent defense services. CP 2843-44. The County does not provide services to or manage any part of Seattle's public defense system. CP 5466. Although ACA used to contract with the State of Washington to represent indigent defendants in sexual predator cases, it no longer does so for economic reasons. CP 2844. TDA contracts with the City of Seattle to provide defense services to the City's Municipal Court. CP 3107-08. It also receives grant money from private foundations to operate a racial disparity project and from the Washington State Office of Public Defense to perform appellate work before the Washington Supreme Court. *Id.* SCRAP has considered contracting with the City of Renton to provide indigent defense services on a conflict basis. CP 2881.

4858. The directors do not consult with, seek approval from, or receive direction from King County when hiring their employees. *Id.* Instead, the corporate boards maintain complete control of the hiring process, including deciding where to recruit applicants, whether and how to interview candidates, and whom to hire. *Id.* For example, SCRAP has a hiring committee composed of attorney and non-attorney volunteers who use set questions to interview potential applicants. CP 2879-80, 2902. The County does not participate in this process or have any control over the questions that are asked of applicants. CP 2854, 2879-80, 2902, 2904-05, 3027, 3091. The corporations' employees are not part of the County civil service system and their compensation is not set by the County, as it is for County employees. Most County non-managerial, non-attorney employees are career service employees entitled to County civil service protections, and if represented, the provisions of any applicable collective bargaining agreements. King County Charter § 550; King County Code §§ 3.12, 3.15. Nothing in the King County Charter, the King County Code, the ordinances governing King County employees, or the King County personnel guidelines governs the work of the corporations' attorneys or staff.

Each board makes its own decisions concerning the duties and responsibilities of its non-attorney staff and their level of pay. CP 2564,

2833-34, 2894-95, 3003-04. For example, the salaries of SCRAP's social workers, investigators, and certified paralegals are all within the same salary designation while its noncertified paralegals are at a lower pay scale level. CP 2874. The salaries the corporations pay individuals in these positions vary significantly; in some instances, the salaries exceed what King County employees working in similar positions are paid. CP 5466, 5779-92.[14] The hiring corporation pays the employee's federal income, Medicare and Social Security taxes. CP 3096. The hours worked and the job duties of each corporation's employees vary depending on the internal structure of the corporation. CP 2853, 2901, 3028, 3085-86, 4843, 5299.[15] The County has no input on the job duties or working conditions of the corporate employees. *Id.*; CP 3088.

Each corporation provides training for its employees and hires outside trainers if needed. CP 484, 2850-51, 2853, 2893, 2916, 2947,

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[14] In 2007, ACA paid its office manager a salary of $55,107.92 and its human resource manager a salary of $78,094; NDA paid its office/HR manager a salary of $76,605; SCRAP paid its office manager a salary of $38,408 and its human resource manager a salary of $76,881; and TDA paid its office manager a salary of $58,714. CP 5466.

[15] For example, class member Terry Howard is a non-attorney staff member who works for NDA as its office manager. CP 3046. She is employed by NDA, not King County. CP 3045. Howard goes to work each day at NDA's office, which is in a private office building in Seattle and not in a building leased or owned by King County. CP 3046. Howard regularly begins her day at 6:30 a.m.; her work schedule is set by NDA. CP 3046-47. Her duties and responsibilities are determined by NDA and she reports to NDA's executive director, not to anyone employed by King County. CP3045, 3052. In turn, NDA's executive director, not anyone employed by King County, supervises Howard and evaluates her work. CP 3052.

2987, 3107, 3704, 3987. The training supervisors determine the topics to include in the training and create their own materials. *Id.* The County does not participate in the employees' training. *See* CP 3704, 3987, 4854.

Corporate employees are evaluated by their respective supervisors; no one from King County participates in the evaluation process. CP 2854, 2924, 3029, 3092-93. Similarly, the executive directors and key managers make independent decisions regarding promotions and demotions and how to monitor and administer discipline. CP 2852-54, 2903, 2919, 2949, 3089, 4852. Employee grievances are handled according to the corporations' internal policies (SCRAP and ACA) or to the applicable collective bargaining agreement (TDA and NDA). CP 2854, 2904, 3063, 3275-78, 3727-29, 5204-06.

King County does not participate in the corporations' decisions involving employee layoffs. CP 2881, 2902, 2906, 2986, 3103. The employees of ACA and SCRAP are at-will and may be terminated at any time, with or without notice and with or without cause.[16] CP 2914, 3183, 4873. The employees of TDA and NDA can only be terminated pursuant to the terms of their respective collective bargaining agreements, which were negotiated with the union. CP 3730, 5209. King County is not

[16] If the staff of these corporations were King County employees, then they would be protected by the County's career civil service system; they could not be terminated without cause. King County Charter § 550.

involved in the corporations' termination decisions. *See* CP 2854, 2904, 3030, 3105-06, 4953. Nor can it require the corporations' attorneys and staff to participate in the County's mandatory emergency budget furloughs in effect through December 2009. King County Ord. 16339 (2008); http://www.kingcounty.gov/about/closures/furlough (last visited 11/20/09).

The corporations rely on employee handbooks or collective bargaining agreements negotiated with the union (or both, in NDA's case) to communicate their employee policies. CP 3178-3355, 3775-3812, 4866-4947, 5183-5225. In doing so, the corporations have initiated and implemented a number of unique personnel policies neither required by nor controlled by the County. For example, SCRAP allows "job sharing" among attorneys that the other corporations do not. CP 2915, 3004, 3198-99. NDA contracts with a car sharing service, while other corporations generally reimburse their employees' mileage. CP 2996, 3383. ACA implemented its own "merit-based" system to address advancement and promotion. CP 2846, 4909-11, 4929-32. TDA has a personal business policy that permits certain employees to use business hours to attend to personal business. CP 3095, 5191. All of the corporations have created policies relating to the rotation of their attorneys among the different units; however, each policy is unique. CP 2855, 2905, 3027-28, 3088, 3982.

Each corporation retains the authority to decide the benefits it will offer to its employees and the corporation's employer contributions, if any. CP 2564, 2829, 2895, 2999, 3096. King County does not control or otherwise dictate how the corporations distribute their funds among the various benefit plans available. CP 2829, 2835, 2839, 2895, 2999, 3001, 3096, 5797-5898. Similarly, each corporation has the discretion to decide whether to provide health, disability, or retirement benefits, and if they choose to do so, how much each one will contribute on behalf of its employees. CP 2829, 2835, 2839, 2895, 2999, 3001, 3096, 3505, 3737. Some of the corporations fully fund their employees' health care benefits; others require employee contributions. CP 2935, 3101, 4720-21.[17] King County does not participate in the corporations' selection of benefit providers. CP 2831, 2877, 3008. The corporations never contended

[17] In June 2002, ACA determined that it needed to make adjustments to the health care benefits it offered to its employees. CP 2837, 4702. ACA's executive director solicited employee input regarding the benefits ACA should offer and how ACA should allocate its funds. CP 4702. Employee input varied: some employees favored eliminating weekly lunches while others suggested eliminating ACA's employer contributions to the employees' retirement program. CP 2837-38, 4703-19. Ultimately, ACA decided which employee benefits would be continued and at what levels. CP 2838, 4720-23. King County played no part in those decisions. CP 2839.

NDA's and TDA's collective bargaining agreements contain provisions related to employee benefits. CP 2898-99, 3101. All of these provisions are subject to negotiation with the union. CP 3101-02. No one from King County was present at or participated in the bargaining sessions between the corporations and their unions. CP 2998, 3101-02.

below that their employees are entitled to participate in King County's health care program.

With regard to retirement benefits in particular, each corporation establishes and manages its own plan, including the type of plan offered, how much money is allocated to the plan, and any changes made over time. CP 2831, 2877, 2898-99, 3008, 3096, 5797-5898. These retirement plans are selected and overseen by the executive directors in conjunction with their individual boards of directors. CP 2831, 2877, 3008, 3096, 4726-39, 5286. King County does not control the types of retirement plans offered or the plan providers. CP 2831, 2877, 3008, 3096, 4726-39, 5286, 5797-5898. Nor does it control the allocation of funds or the level of contribution, if any, made by the corporations. *Id.*[18]

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[18] SCRAP has Internal Rev. Code; 26 U.S.C. § 403(b) ("403(b) plan"), for which it pays the administrative costs. CP 2876. Its employees may choose to contribute to the fund. *Id.* A 403(b) plan is only available to employees of private, nonpublic employers. 26 U.S.C. § 403(b). SCRAP employees may contribute to the plan using pretax dollars. CP 2876. Some do, and some do not. *Id.* In the past, SCRAP made contributions to the fund on behalf of its employees. CP 2877. This practice was discontinued in 2001 at the direction of SCRAP's executive director. *Id.* No one from the County participated in that decision. *Id.*

ACA also provides its employees with the option to make their own pretax contributions to a 403(b) plan. CP 2838-39. On the forms that ACA files with the federal government each year, this plan is identified as a "single employer" plan. CP 2832, 4641. The "single employer" is ACA, not King County. CP 4641. ACA also offers a profit sharing/retirement plan into which it makes contributions on behalf of its employees. CP 2831. ACA's board and ACA's executive director make decisions about the administration of this plan. CP 2832, 2835. In 2000, ACA converted the retirement plan to a self-directed plan to allow its employees to choose how their funds are invested. CP 2830, 4538. This decision was made without County control, direction, or influence. *Id.* In 2003, ACA reduced the amount it set aside as the employer's contribution to its employees' retirement plan. CP 2830, 2833, 2838. This decision was made by its

Most critically, in addition to having no role in the hiring, disciplining, evaluating, terminating, or compensating of the corporations' employees, the County does not control the provision of services by the corporations' staff attorneys and employees. CP 2854, 2904, 2919, 2924, 3085-86, 3030, 3106. It does not purport to dictate which attorneys represent which clients or interfere with how the attorneys represent their clients. CP 2568, 2924, 3085-86. The County does not control the day-to-day activities of the corporations' non-attorney staff. *See* CP 2834, 2894-95, 3003-04.

Given its commitment of public resources to criminal defense,[19] King County must supervise the expenditure of those resources. As authorized in King County Code §§ 2.60.030(A) and 2.60.040, the County Executive enters into contracts with private corporations to provide legal services to defendants, subject to approval by the King County Council. The County provides funds to the corporations to perform defined public

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executive director and the ACA board. CP 2839. No one from the County participated in this decision. *Id.*

In the past, NDA had a profit sharing plan into which it sometimes made contributions on behalf of its employees. CP 2995-96, 5797-5804. In 2006, NDA terminated the plan and distributed the funds, allowing its employees to rollover the income into their 403(b) or other qualifying plan. CP 3008, 3703. No one employed by the County participated in the discussions by NDA's executive director and board of directors leading to the dissolution of NDA's profit sharing plan. CP 2996.

TDA has a SEP plan that it negotiated with the union without County participation. CP 3096, 5183, 5200-02, 5227-28, 5286, 5290.

[19] Such services are required under Washington Constitution, art. I § 22.

defender services pursuant to those contracts and then monitors financial and operational performance of the funds, just as it monitors other service contracts.

In 1970, the County established the Office of Public Defense as a division of the executive branch of the County as a way to negotiate and administer its public defense contracts. CP 5464.[20] Generally, OPD and the Public Defender are responsible for negotiating four new, separate contracts each year. *Id.* Those contracts are then approved by the Council. *Id.*

Before entering into a new public defense contract, the County requested information from each corporation detailing the amount of money each corporation expected to spend on salaries, overhead, and other required administrative costs. CP 5464. Prior to 2005, the County used these estimates to calculate a per-case cost; the County would then offer each corporation a total sum of money to provide services under the contract. CP 5464-65. Under the pre-2005 model, each corporation could

[20] Prior to 2002, the head of OPD was called the Administrator (who may or may not have been an attorney). CP 5464. That person was responsible for negotiating and administering the County's public defense contracts. *Id.* In 2002, pursuant to King County Code § 2.60.020, the name of OPD was changed to the "Office of the Public Defender" and an attorney was appointed to the position of "Public Defender," replacing the role of Administrator. *Id.*

be offered a different amount of money per case because the submitted expenditure estimates varied by corporation. CP 5465.

In 2005, the County changed its funding model for subsequent contracts. CP 5465, 5771-77. The County now offers each corporation the same amount of money per category of case, regardless of the corporation's internal decisions relating to salaries, rents, and other expenditures. CP 2564, 5465. Because this is only a formula or mechanism for the County to decide how much to appropriate for the public defense contracts generally, each corporation remains free to allocate the total contractual sum in a variety of ways, including the allocation of retirement benefits to its employees. CP 2564, 5465, 5775.

Although the County's model for funding its public defense contracts has evolved over time, the basic principles that govern the relationship between the County and the corporations remains largely unchanged. CP 5465. The County builds a public defense budget by assuming each corporation will need a total sum of money to provide legal services, based on a system that establishes credits for cases and a dollar value for each credit. CP 5464-66, 5469-73, 5526-37. But once that sum is provided to a corporation, the corporation retains operational discretion over how the funds will be spent. *Id.*; CP 2564. Through the contractual terms, the County defines the scope of services for which it is contracting,

requiring the corporations "[t]o provide effective assistance of counsel to indigent persons." CP 5516. During the contract term, the County conducts periodic reviews to ensure sound financial performance and to ensure the terms of the contract are being met. CP 5474. The County also monitors the corporations' performance to ensure the public defender attorneys are providing quality legal services and meeting the basic contractual standards relating to the quality of the representation provided. CP 5464, 5466.

These principles, and many of the specific contractual terms, are similar to the elements and terms of a "model contract" the National Legal Aid and Defender organization ("NLADA") has recommended for governments that provide defender services through contracts. CP 4012-83. The NLADA model project was chaired by former TDA executive director Bob Boruchowitz, and was designed to ensure that a government's contractual money did not necessarily go to the lowest bidder. CP 2801. The NLADA model contract contains quality assurance safeguards and other protections (such as staffing levels, minimum attorney qualifications, inspections, and a corrective action process in the event of a breach) designed to ensure that indigent defendants receive quality representation of counsel. CP 2802-03, 4012-83. The NLADA model contract contains a provision expressly entitled "Independent

Contractor" that confirms the corporation's status as an independent contractor and the corporation's attorneys and non-attorney staff as employees of the corporation and not employees of the governmental funding entity. CP 2802, 4024.

(3) Procedure Below

On January 24, 2006, plaintiff Kevin Dolan filed a class action[21] lawsuit in the Pierce County Superior Court claiming that employees of the four corporations were "public employees" eligible for membership in PERS. CP 1-6. The class sought declaratory and injunctive relief requiring King County to identify members of the class as public employees "to the Department of Retirement Systems for the purpose of retirement benefits," and to "make the required contributions on their behalf." CP 5. The class sought fees as well. *Id.* King County answered the complaint. CP 49-54. The case was assigned to the Honorable John Hickman.

The parties stipulated that the class could amend its complaint, CP 96, and the trial court permitted the filing of the amended complaint. CP 97. That amended complaint added claims for possible PERS 3 retirement

[21] The class was defined as "All W-2 employees of the King County public defender agencies and any former or predecessor King County public defender agencies who work or have worked for one of the King County public defender agencies within three years of the filing of this lawsuit." CP 69.

benefits. CP 101, 102.[22] King County answered the amended complaint and counterclaimed for all of the PERS contributions such employees might be obligated to make if they were PERS-eligible. CP 116-26.[23]

The trial court certified the class, CP 128-31, and later ruled that opt-outs by class members were not required. CP 530-33.

King County moved for partial summary judgment, arguing that the class claims were subject to a three-year statute of limitations. CP 290-301. The trial court denied that motion, CP 534-35, even though the class had earlier indicated that it might be seeking PERS contributions for its members from King County for up to thirty years. CP 290.

The class and the County filed cross-motions for summary judgment on the issue of whether the class members were public employees. CP 536-80, 2491-2534; RP 3-48. The trial court denied both parties' motions. CP 6463-66. The parties filed a joint motion for reconsideration on the public employee issue, which the court denied. CP

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[22] The breadth of damages sought by the class was extensive:

> Monetary damages in an amount equal to the actuarial value of the lost pension including future pension value, and including an additional amount to account for the fact that Dolan and the class members will receive damages for the lost pension in one lump sum instead of its monthly pension checks which would be taxed at lower rates.

CP 103.

[23] The class moved to dismiss King County's counterclaim, but the trial court denied that motion without prejudice. CP 285-86.

6480-81; RP 51. The court ordered that a bench trial on the public employee issue be held on the same factual record that the parties had submitted in connection with the cross-motions for summary judgment. CP 6499. The court concluded the trial in chambers based solely on that evidentiary record, and without hearing testimony from any witnesses.[24] CP 6647, 6932; RP 50-52.

On February 9, 2009, the trial court issued a written decision determining that "for purposes of the PERS statute, in Washington State, that the Plaintiff, and the class members that he represents, should be considered public employees for purposes of coverage under Washington's PERS statute." CP 6654. *See* Appendix. The court's written decision contained findings of fact and conclusions of law regarding the bases for its public employee ruling. CP 6648-70. The decision did not address the class's other claims, including the scope of any remedy. CP 6670.

King County filed a timely notice for discretionary review of the decision by this Court. CP 6674-6709, 6934-60. On April 17, 2009, the trial court granted King County's request for RAP 2.3(b)(4) certification of its written ruling, CP 6931-33, and entered an order granting the class's requested injunction. CP 6930. At that same hearing, the class attempted

[24] The trial court heard opening and closing arguments from the parties. RP 52, 59-160, 165-237.

to present findings of fact and conclusions of law for entry. CP 6710-66; RP 240. The County objected, noting that the findings far exceeded the trial court's written decision. CP 6833-39; RP 251. The trial court agreed and rejected the class's proposed findings and conclusions. CP 6929-30; RP 260-61. The class submitted a more truncated set of findings and conclusions. CP 6963-88; RP 276. The County again objected, offering specific objections to the proposed findings and conclusions. CP 6991-99; RP 290-92. The trial court entered findings and conclusions on June 1, 2009 after excising substantial portions of the class's proposed findings and conclusions. CP 7084-85, 7087-7112. On June 24, 2009, this Court granted direct discretionary review.

D. SUMMARY OF ARGUMENT

The class members do not qualify as PERS members within the meaning of RCW 41.40.010(22) and WAC 415-02-110 because they are employees of the corporations who contract with King County. King County does not exercise the requisite control over how the class members perform their work to satisfy the requirements of a common law master-servant relationship.

Similarly, the corporations do not meet the definition of a PERS employer under RCW 41.40.010(4)(a). King County exercises budgetary oversight on the expenditure of public monies entrusted to the

corporations; however, that does not transform them into agencies of King County government. The County and the corporations have prided themselves on the independence of those organizations. Neither the Legislature nor the King County Council have made the corporations public agencies. The corporations are not "de facto" County agencies.

Finally, the class members are estopped from claiming the status of public employees. In prior litigation, employees of one of the corporations have been found to be private employees, not employees of King County. Moreover, the class members have, in some instances, been organized by unions subject to NLRB jurisdiction. The NLRB has jurisdiction over private employees, but not public employees. 29 U.S.C. § 152(2). Similarly, the class members have enrolled in 403(b) retirement plans, which are available only to private employees. Thus, the class members cannot claim to the NLRB they are private employees subject to its jurisdiction or to the IRS that they are private employees for certain retirement benefits and now claim they are public employees eligible for PERS.

E. ARGUMENT

(1) Standard of Review for Trial Court's Findings and Decision

Findings of fact are ordinarily reviewed to determine if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.,* 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Conclusions of law are reviewed *de novo*. *Bishop v. Miche,* 137 Wn.2d 518, 523, 973 P.2d 465 (1999). However, if findings are actually conclusions of law in disguise, they are reviewed as if they were conclusions of law. *Woodruff v. McClellan,* 95 Wn.2d 394, 396, 622 P.2d 1268 (1980). In this case, numerous trial court findings were actually conclusions of law, particularly those in which the trial court concluded that King County exercised "control" over the corporations' employees. *See, e.g.,* CP 7090, 7091, 7093, 7095 (FF 9, 17, 25, 34).

Additionally, this Court does not employ the ordinary review standards where the trial court ruled in the case on a paper record. Where, as here, the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record *de novo*." *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). As this Court has observed, "when the record only contains documents, we review without deference to the trial court." *State v. Neff*, 163 Wn.2d 453, 461, 181 P.3d 819 (2008).

(2) Public Defense Services in Washington

Washington law clearly confers upon local jurisdictions like King County the right to provide public defense services directly through County employees, by contract with private providers, or through assigned counsel. RCW 10.101.030. State law dictates that each county or city providing public defense services adopt standards governing the delivery of such services, including:

> Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.

Id. Moreover, RCW 10.101.060 and .070 narrowly prescribe the requirements counties must address in their public defense contracts before they may receive state funding for public defense services. *See* Appendix. Thus, many of the contractual requirements in King County's contracts are mandated by state law.

(3) The Class Members Do Not Qualify as Public Employees of a Public Employer Under PERS

The trial court here concluded that the class members met the statutory definition of public employees of a public employer in RCW

41.40.010, entitling them to PERS membership. CP 6669, 7111. The trial court's decision is wrong because it focused unduly on the funding source for the corporations' contracts with King County rather than on the common law test for master and servant *mandated by statute and regulation*. Moreover, there is a certain irony in the class's position with respect to the alleged control King County exerted over the corporations' employees. From the time of the establishment of those contracts to the present, the corporations' employees have insisted upon their independence from the County's control over their day-to-day operations.

(a) The Class Members Are Not Employees as Defined in RCW 41.40.010(22) and WAC 415-02-110

RCW 41.40.010(22) defines a PERS "employee" as "a person who is providing services for compensation to an employer, unless the person is free from the employer's direction and control *over the performance of the work.*" (emphasis added). That statute directed the DRS to adopt interpretive rules "consistent with common law." *Id.* DRS did so in WAC 415-02-110, which interprets the statutory provisions of RCW 41.40.010: "An independent contractor is not eligible for active membership in any state-administered retirement system." WAC 415-02-110(1). The rule articulates a series of questions similar to the ones used to identify a master-servant relationship. WAC 415-02-110(2)(d). *See* Appendix. The

rule places the burden of proving PERS eligibility on the person claiming it. WAC 415-02-110(4).

Here, the trial court did not address the issue of the master-servant relationship at common law, nor did it examine the elements of a master-servant relationship to meet the test of RCW 41.40.010(4)(a) as set forth in WAC 415-02-110(4). Had it done so, it would have been crystal clear that the corporations' employees are not common law County employees.

Washington common law has long distinguished between independent contractors and employees. *Hollingbery v. Dunn,* 68 Wn.2d 75, 80, 411 P.2d 431 (1966). At common law, the ultimate test to determine whether the relationship is that of employer and employee or that of principal and independent contractor is the degree of control exercised by the employer/principal over the manner, method, and means of doing the work involved. *See, e.g., Hubbard v. Dep't of Labor & Indus.*, 198 Wash. 354, 358, 88 P.2d 423 (1939); *Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960). Washington has adopted the factors set out in the *Restatement (Second) of Agency* § 220 to determine whether a person is an employee.[25] *Hollingbery*, 68 Wn.2d at 80

[25] The *Second Restatement of Agency* was superseded by the *Third Restatement of Agency*, which was adopted in 2005 and published in 2006. Rather than list factors to weigh, the *Third Restatement of Agency* defines what an employee is and focuses on the degree of control the principal exercises over the agent. *Restatement (Third) of Agency* § 7.07 (2006).

(quoting *Restatement (Second) of Agency* § 220(2) (1958)). Those additional factors include:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant;[26] and

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[26] In the worker compensation context, this factor is even more central. As noted by this Court in *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 709 n.4, 57 P.3d 248 (2002), the master-servant relationship is a two-part test:

> (1) does the employer have the right to control the person's physical conduct in the performance of his duties? and (2) has the person consented to the relationship?

Thus, an employee's consent to the employer-employee relationship is mandatory.

(j) whether the principal is or is not in business.

Id. In *Hollingbery*, this Court explained:

> All of the factors listed are of varying importance in making the determination. With the exception of the element of control, however, it is not necessary that all remaining factors be present, for no one factor is conclusive and, in the final analysis, all directly or indirectly relate to, or inferentially bear upon, the crucial factor of control or right of control resident in the employer or principal.

Id.

The critical factor in both the common law test and WAC 415-02-110(2)(d) is the right to control *the details of the employee's work,* not only as to the result to be achieved, but also the means and methods by which the result is accomplished. To establish control, the principal must exercise control over the physical conduct of the performance of the service. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002). The County never exercised such control over the corporations' provision of defense services.[27] The exercise of oversight over the outcome intended by the contract is not the equivalent of such control. A

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[27] The trial court acknowledged this fact in denying the parties' motion for summary judgment:

> There is no question that the non-profit corporations were established with the intent to show maximum autonomy on behalf of the non-profit corporations when it comes to the overall management of the legal services and supervision [of] said employees.

CP 6464. *See also,* CP 6654-55.

reservation by the employer of the right to inspect and supervise the work to ensure it is being done in accordance with the contract does not establish that control. *Larson v. Centennial Mill Co.*, 40 Wash. 224, 228, 82 P. 294 (1905) ("... a reservation by the employers of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation.").

Additionally, the fact that the corporations provided services to municipalities other than King County is important. That the relationship between the County and the corporations was *nonexclusive* supports the County's position that the corporations were merely contractors whose employees were not covered by PERS.

DeWater v. State, 130 Wn.2d 128, 921 P.2d 1059 (1996), is analogous to this case. There, an employee of a foster parent sued the foster parent for sexual harassment and claimed the State was vicariously liable for the foster parent's acts because he was an employee of the State. This Court rejected that argument because the State did not have control over the operation of the foster home:

> In this case there is no employee/employer relationship primarily because there is no right to control the daily actions of the foster parent and thus no ability to supervise or interfere with the day-to-day interaction between a foster parent and those working in the foster home. The State

> could revoke a foster parent's license and remove foster children from the home, but it would have no right to otherwise "control" the actions of the foster parent. A foster parent is therefore not a state employee.
>
> At most, the foster parent is an independent contractor for the State. A principal may be vicariously liable for the acts of its independent contractor if the principal has retained the *right to control* the manner of doing the work and the means by which the result is to be accomplished.
>
> The State has not retained such control in the foster family setting even where, as here, the foster home is a specialized home and is highly structured for the safety and treatment of the children placed there. Mr. Troyer had complete authority to hire, fire and supervise the trackers who worked in his home. He set their schedules and directed their work. The trackers had no contact with any State agency who had supervisory duties over the foster home.

Id. at 140-41 (citations in text omitted).

Here, the corporations' employees are not under the County's direction and control as contemplated by WAC 415-02-110(2)(d). It is undisputed that the County does not hire, discipline, or fire the corporations' attorneys or staff. It does not set their hours of service.[28] It does not train or otherwise supervise them in their provision of legal services to their clients.

[28] A clear example of this fact is that while County employees were required to endure mandatory furloughs without pay in 2009 due to budget constraints, the corporations' employees did not have such furloughs. *See* King County Ord. 16339 (2008).

Moreover, Paragraph XIV(A) of the parties' contracts specifically provides that the County is *not* the class members' employer:

> In providing services under this Contract, the Agency is an independent contractor, and *neither it nor any of its officers, directors, employees, subcontractors, agents, or representatives are employees of the County for any purpose*. The Agency shall be responsible for all federal and/or state tax, industrial insurance, and Social Security liability that may result from the performance of and compensation for these services and shall make no claim of career service or civil service rights which may accrue to a County employee under state or local law."

CP 5464, 5696 (emphasis added).[29] Contrary to FF 8, the relationship between the County and the corporations in the delivery of public defense services is *not* unique.[30]

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[29] The class argued below that RCW 49.44.160 supports their position. CP 2580, 2582-83. It does not. That statute forbids public employers from misclassifying employees or otherwise taking actions to avoid providing benefits to employees to which they are entitled by law or collective bargaining agreements. However, the statute expressly recognizes that the usual standards "such as control over the work" will govern whether a person is a contractor or employee, and states: "Common law standards should be used to determine whether a person is performing services as an employee, as a contractor, or as part of an agency relationship." This is, of course, entirely consistent with King County's argument here as to RCW 41.40.010(22) and WAC 415-02-110.

[30] In a 2008 report, the WSOPD acknowledged five different types of defense systems in use in Washington:

- Public defender agencies are county-funded agencies;
- Nonprofit systems involve the county contracting with a nonprofit group or groups that are organized to provide public defense services;
- Contract public defense systems are systems in which the county enters into contract with one or more private attorneys to provide representation;

Instead of addressing whether King County actually controlled the *performance of their work*, the class presented evidence that the County engaged in policy and budgetary oversight. But this oversight is mandated by state law. RCW 10.101.060. Like the class, the trial court confused budgetary oversight of the expenditure of public funds and strict oversight of the corporations' compliance with indigent defense standards with control over the work of the public defenders.

It appears the trial court believed that because the County adopted a formula for developing its annual budget based upon a certain amount of

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- List appointment systems involve list of attorneys who have agreed to accept public defender cases, who are appointed by the court on a case-by-case basis;

- Conflict appointments of alternate attorneys are made by judges when the initially appointed public defense attorney is prohibited by ethics rules from representing an individual defendant, usually due to prior representation of another party in the case.

2008 Status Report on Public Defense in Washington State at 22. In fact, WSOPD is an independent agency, created by the Legislature in 1996. It was originally created to deliver indigent appellate services. The Legislature has since expanded WSOPD's responsibilities.

WSOPD administers state funds appropriated for criminal trial indigent defense services, appellate indigent defense services, and the Parents Representation Program for dependency cases. As of 2008, WSOPD managed a $54 million budget. The bulk of its budget was paid to contractors, pilot programs, counties, and cities under programs set in statute or budget provisos. *See* Joint Legislative Audit & Review Committee Report 08-2, *Office of Public Defense Sunset Review* at 3 (2008) (JLARC Rpt.).

WSOPD contracts with over 50 attorneys to represent indigent appellants. http://www.opd.wa.gov. The Court of Appeals appoints an attorney based on a recommendation from OPD, and virtually all indigent appeals where there is a right to an attorney are handled by attorneys under contract with WSOPD. JLARC Rpt. at 5. WSOPD treats its contract attorneys as vendors, and requires them to submit W-9 forms. The attorneys must submit contractor invoices within 60 days of each payment event recognized by WSOPD to be compensated for their services.

money per case, it was effectively "controlling" the corporations' delivery of services. This is not true. The Court confused a formula for building a budget, driving funds to the corporations through OPD based on the number and types of cases taken by the corporation. CP 2565, 5465; RCW 10.101.070(1)(b), with the undisputed fact that the formula generated a sum of money that *each corporation could spend any way it wanted.* CP 5465.

Although the corporations' contracts require them to ensure that their attorneys meet County ethics standards, limit their outside work, and limit their number of active cases, CP 7101, 7105, 7106 (FF 57-58, 77, 79, 82), these mandates are *imposed by state law.* RCW 10.101.060. Requiring the corporations to provide periodic reports or to subject themselves to audits, CP 7107-08 (FF 90), is consistent with routine budget oversight of an outside contractor by government. The County would be remiss if it did not supervise the corporations and their expenditure of public funds in this fashion. This Court has clearly held that the inspection of work and the right to demand contract compliance activities by a principal does not constitute "control" over an independent contractor under the common law dated back to *Larson* in 1905. *See also, Kamla,* 147 Wn.2d at 120-21; *Hennig v. Crosby Group, Inc.,* 116 Wn.2d 131, 134, 802 P.2d 790 (1991).

The class repeatedly trumpets the County's 2002 decision to seek a receivership for NDA as evidence of County control. CP 7097-98 (FF 42-43, 46-47, 49-50, 52). If the County's "control" over NDA is as extensive as the trial court believed it was, *the County would not have had to institute a receivership*. Instead, it would simply have stepped in and assumed control of NDA. It did not. As noted in *Northwest Defenders*, *a court*, not the County, ordered NDA into receivership because NDA had not had a functioning board of directors for seven years, and its executive director acted without effective supervision, using public moneys meant for *public defense* to establish a for-profit law firm and to lease expensive office space. The Court of Appeals held that the appointment of the receiver was valid where NDA forfeited its corporate rights by acting contrary to RCW 24.03.100 and the receiver was necessary to "secure ample justice to the parties." *Northwest Defenders,* 118 Wn. App. at 126. A receiver was necessary to avoid disruption of NDA's ongoing operations. *Id.*

Here, the class failed to establish the requisite common law master-servant relationship with King County under RCW 41.40.010(22) or WAC 415-02-110. King County did not exercise control over the method or manner by which the corporations' employees performed their actual work.

(b) The Class Members Are Not Employees of a De Facto County Agency

Recognizing the weakness of their contention that they are County employees, the class argued below, and the trial court agreed, that the corporations are de facto County agencies and therefore their employees are eligible for PERS. CP 2712-18, 7110-11 (FF 100; CL 3-4).[31] Distilled to its essence, the trial court's test for determining that the corporations were, in effect, County agencies was (1) the corporations carried out a public purpose, and (2) the corporations received public financing to carry out that purpose. *See, e.g.,* CP 7088-89 (FF 1-3). If the trial court's test is allowed to stand, virtually every employee of the many contractors who routinely contract with all levels of government in Washington would become PERS-eligible.

RCW 41.40.010(4)(a) defines a PERS Plan I employers as:[32]

> ... every branch, department, agency, commission, board and office of the state, any political subdivision or association of political subdivisions of the state admitted into the retirement system, and legal entities authorized by RCW 35.63.070 and 36.70.060 or chapter 39.34 RCW; and the term shall also include any labor guild, association, or organization the membership of a local lodge or division of which is compromised of at least forty percent employees

[31] This argument is tantamount to an admission by the class members that they are employees of the *corporations*, and not King County.

[32] This definition is largely the same for PERS Plan 2 and 3 employers, except that school district staff may not be PERS members. RCW 41.40.010(4)(b).

> of an employer (other than such labor guild, association, or organization) within this chapter. The term may also include any city of the first class that has its own retirement system.

This statutory definition was not examined by the trial court. The language of the definition is plain and unambiguous as to which governmental bodies qualify as PERS employers.[33] It does not include private corporations performing government services.[34]

The class cannot cite a *single case* in which a private organization not expressly enumerated in RCW 41.40.010(4)(a) has been held to be a PERS employer. In fact, RCW 41.40.010(4)(a) indicates that the Legislature readily understood how to make a private association a PERS employer. In that statute, unions representing public employees may be PERS employers. *See also,* WAC 415-108-620.

The corporations do not meet the definition of .010(4)(a). They are not divisions, agencies or departments of the County. While the King

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[33] In determining the meaning of a statute, this Court applies general principles of statutory construction. "The primary goal of statutory construction is to carry out legislative intent." *Cockle v. Dep't of Labor & Indus.,* 142 Wn.2d 801, 807, 16 P.3d 583 (2001). These principles begin with the premises that if a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); *Limstrom v. Ladenburg,* 136 Wn.2d 595, 606, 963 P.2d 869 (1998). If the language of the statute is plain, then this Court's inquiry ends. *Cerrillo v. Esparza,* 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

[34] By contrast, RCW 41.40.160 allows the employees of a private corporation acquired by a public agency to get PERS credit for the time the employees were employed by the private firm. AGLO 1974 No. 35.

County Charter provides that the Council can create divisions, agencies and departments, the Council has not done so here. Article 2, § 220.20 of the Charter provides that the Council has the power to "establish, abolish, combine and divide administrative offices and executive departments and to establish their powers and responsibilities." All such administrative offices and executive departments are part of the executive branch of the County government. King County Charter art. 3, § 310. The County Code further provides that the County's executive branch includes the county executive, the county administrative officer, administrative offices with specific functions; executive departments determined according to major assigned functions or processes; and *divisions within departments and administrative offices, where created by ordinance, that perform delegated functions or duties.* KCC § 216.020A (emphasis added). The Council has not passed an ordinance or taken other legislative action that would establish the corporations as County executive departments.

Lacking any support in RCW 41.40.010(4)(a), the class looks elsewhere to support its argument. The class urges that certain AGOs provide that persons who were employees of private employers are PERS-eligible. The AGOs do not support the class's argument. For example, in AGO 55-57 No. 267, the Attorney General opined that employees of the Associated Students of the University of Washington ("ASUW"),

organized as a nonprofit corporation, were eligible for PERS. The opinion flowed readily from the fact that the ASUW historically was controlled by the University and was "an arm and agency of the state and University of Washington." *Good v. Associated Students of the Univ. of Washington,* 86 Wn.2d 94, 98, 542 P.2d 762 (1975) ("It is clear that the ASUW is subject to ultimate control by the regents [of the University of Washington]."). In fact, 1935 and 1938 superior court decisions concluded the ASUW was part of the University, which, in turn, was clearly a state agency. The president of the University had the authority to approve or disapprove all ASUW actions and the ASUW constitution stated it was "an integral part" of the University and gave the President of the University such authority over it. *See also*, AGO 1993 No. 18 (employee of nonprofit corporations performing fundraising services for higher education institutions were not entitled to PERS benefits because such institutions "may not provide state employee benefits to employees of a private nonprofit organization if the organization is not an agency of the state.").

The class also references a DRS ruling involving the employees of the Washington State University Bookstore. CP 6604-19. To the extent it is even "authority," the DRS ruling offers little support to the class's argument. The WSU regents constitute the board of directors for the Bookstore. CP 6606. Thus, like the ASUW, the Bookstore was clearly an

arm of WSU. That is plainly not true for the four corporations here who studiously maintained their independence from the County with boards of directors that were not controlled in any fashion by the County.

The class focused on two cases below that they assert stand for the proposition that the corporations are de facto County agencies making their employees PERS members. CP 2713-15 (relying on *State ex rel. Public Employees' Retirement Bd. v. City of Portland,* 684 P.2d 609 (Or. App. 1984) and *Clarke v. Tri-Cities Animal Care & Control Shelter,* 144 Wn. App. 185, 181 P.3d 881 (2008)). Both cases are readily distinguishable. First, neither case arises under the specific provisions of RCW 41.40.010(4)(a). That statute contemplates that only duly constituted government agencies or private organizations specifically authorized by law meet the definition of a PERS employer.

Second, Oregon apparently recognizes that a private nonprofit corporation can be an "alter ego" of a public agency where a local government establishes such a corporation. For reasons articulated *infra*, Washington law does not so readily acknowledge such de facto public agencies. Moreover, the facts in the Oregon case reveal that the nonprofit corporation was actually a City agency. In *State ex rel. Public Employees Retirement Board,* the City of Portland established a nonprofit corporation by order of its City Council to implement private portions of the City's

energy conservation policy. The corporation could be dissolved by the City, its rules and procedures were subject to approval or amendment by the City, and its board consisted of members appointed by the City Council who served at its pleasure. This level of control is a far cry from the independence exercised by the corporations here.

Finally, Division III's decision in *Clarke*, a Public Records Act ("PRA") case, also does not aid the class. PRA cases are unique. The policy of that Act is to *require* disclosure of all documents generated by public agencies. RCW 42.56.070(1); RCW 42.56.100. The Act is to be broadly construed. RCW 42.56.030. RCW 42.17.020(1) broadly defines a public agency to include listed state and local governments and their subdivisions and extends the Act to "other local public agenc[ies]," an amorphous provision designed to ensure that even private organizations transacting public business must disclose public records. The *Clarke* court found the Tri Cities Animal Care & Control Shelter was the equivalent of a public agency precisely because the PRA must be construed "liberally in favor of the fullest possible public records access." 144 Wn. App. at 195.

Clarke's holding was based on another PRA case, *Telford v. Thurston County Board of Comm'rs*, 95 Wn. App. 149, 152-56, 974 P.2d 886, *review denied,* 138 Wn.2d 1015 (1999), in which the court applied the PRA to Washington State Association of Counties and Washington

State Association of County Officials, two private organizations performing public duties.[35] The court applied a functional equivalence test to determine if those associations were subject to the PRA's prohibition on the use of public funds in political campaigns.[36] Here, PERS has no corresponding direction to liberally construe its provisions to make virtually every employee of parties contracting with government at all levels PERS-eligible. This makes fiscal sense. The Legislature did not intend to open the door widely to allow employees of private organizations to become PERS members. If anything, RCW 41.40 is to be strictly construed regarding PERS eligibility. *Nothing* in RCW

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[35] Washington law recognizes various associations for local governments. *See, e.g.,* the Washington Association of Fire Commissioners (RCW 57.12.031(4)), the Washington Association of Sewer and Water Districts (RCW 57.08.112); the Washington School Directors Association (RCW 28A.345.010); the Washington Public Ports Association (RCW 53.06.030); the Association of Washington Cities (RCW 35.102.040); or the Washington Association of Prosecuting Attorneys (RCW 36.27.110). In the case of the Washington State Association of Counties (RCW 36.47.010), its employees are not PERS-eligible, as the *Telford* court noted, because the Legislature excluded the employees of associations of political subdivisions from PERS II. *Telford,* 95 Wn. App. at 155-56. In the case of the Washington Association of Sheriffs and Police Chiefs, its employees are not entitled by statute to a public pension. RCW 36.28A.010. Although these organizations may be subject to the PRA, their employees are still the employees of a private association, and they are *not* PERS-eligible.

[36] The *Clarke* court also referenced *Champagne v. Spokane Humane Soc.*, 47 Wn. App. 887, 737 P.2d 1279, *review denied,* 108 Wn.2d 1035 (1987) (public duty doctrine applied to humane society to which County had delegated all animal control enforcement responsibilities by ordinance) and *Spokane Research & Defense Fund v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 137 P.3d 120 (2006), *review denied,* 160 Wn.2d 1006 (2007) (test not applied to Association as its activities were nongovernmental). *See also,* AGLO 1971 No. 110 (Expo '74, a nonprofit corporation created at the direction of 1971 legislation to operate the Spokane World's Fair, was public agency where its board of directors consisted of the persons appointed by, or being, public officials who made up the Expo '74 Commission).

41.40.010(4)(a) corresponds to the amorphous "other public agency language" in RCW 42.17.290.

The class's present contention that the corporations are "de facto" County agencies is contrary to their historical independence, inconsistent with Washington law disfavoring "de facto" public agencies, and utterly impractical, confusing appropriate contract budgetary and policy oversight with "de facto" agency status.

The corporations are not de facto County agencies because they have historically been independent from County government. All four corporations describe themselves on their websites as 501(c)(3) corporations; TDA and SCRAP say even more. According to TDA, it "is a non-profit corporation founded with Model Cities funding in 1969 and has an *independent Board of Directors*." It is "now the largest *criminal law firm* in the state." It is also "recognized regionally and nationally as a leader in public defense[.]" http://www.defender.org/about, last visited 4/29/2009. Similarly, SCRAP "is a private, non-profit public defense law firm[.]" http://www.societyofcounsel.org, last visited 4/29/2009.

Bob Boruchowitz, who testified below, also testified about the founding of TDA during public hearings sponsored by the American Bar Association in 2003:[37]

> Then during that year the King County bar, under a lot of pressure from the community, formed a task force which included a lot of the real lawyers as you call them from the civil bar, ... and they recommended a nonprofit model for the county system. And then the county agreed with that and hired our office to be the county public defender, and now we have four county public defenders with the volume and conflicts.

Boruchowitz ABA Testimony at 64.

Boruchowitz concluded by noting "the King County judges have been very happy with I think *having an independent model* and have become accustomed to that in a way that many judges are not." *Id.* at 65 (emphasis added).

Boruchowitz also noted in his testimony:

> When I first became a director, I went to a training that was funded by the Justice Department .... I'm happy to say as the director of a nonprofit, *while I have lots of political pressure in terms of my budget, I almost never have the kind of pressure where a judge calls me up and says, 'You have to fire Randolph Stone; he's really a terrible guy.'* I

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[37] During the 40th anniversary year of *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), the ABA's Standing Committee on Legal Aid and Indigent Defendants held a series of public hearings to examine *Gideon's* continuing effect on the right to counsel. *Gideon's Broken Promise:* America's Continuing Quest for Equal Justice; A Report on the ABA's Hearings on the Right to Counsel in Criminal Proceedings at 1 (December 2004). Extensive testimony was received from 32 expert witnesses, including Boruchowitz. *Id.* Boruchowitz's testimony is available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/gid1excerptboruchowitz.pdf, last visited on July 10, 2009 (hereinafter "Boruchowitz ABA Testimony").

> think I've had five phone calls in the twenty-four years as director .... *I don't get those kind of calls. And I think it's because we've been able to establish our nonprofit independent system* with good bar support both locally and statewide that you don't do that with us.

Id. at 63 (emphasis added).

The independence of the corporations has, in fact, been maintained in practice because, as noted *supra*, they have their own articles of incorporation and bylaws confirming their independent nonprofit status, they have independent boards of directors who are not County employees, and OPD does not direct or control the directors' elections to those boards. The boards hire their respective executive director and set the terms and conditions of his or her employment. Each corporation files an annual Form 990 with the Internal Revenue Service, confirming its status as a private, nonprofit 501(c)(3) organization. The boards decide annually whether to contract with King County. The corporations develop their budgets annually. The executive directors select and hire audit firms to conduct annual independent financial audits. The executive directors of the corporations, in conjunction with their boards, are responsible for the day-to-day operations of the corporations, including their office space, equipment and supplies, internal staffing structures, and hiring decisions.[38] To communicate their employee policies, the corporations establish and

[38] The class has never contended that the corporations must seek approval from King County when hiring or firing employees. *See* CP 2854, 2904, 3030, 3105-06, 4953.

rely on employee handbooks or on collective bargaining agreements that have been negotiated with the union. The corporations choose how to allocate their contractual funds among various types of employee benefit plans, including retirement and/or profit sharing plans.

The corporations do not fit the narrow definition in Washington law of a de facto agency. Washington follows the well-understood concept that while there can be a de facto officer, there can be no officer de facto without an office de jure. 3 *McQuillin Municipal Corp.* § 12.104 (3d. ed.). In fact, in a constitutional government there is no such thing as a de facto office. *Id.* Thus, de facto offices are *disfavored* in Washington law. *Drum v. University Place Water Dist.*, 144 Wash. 585, 588-89, 258 P. 505 (1927); *Higgins v. Salewsky,* 17 Wn. App. 207, 212, 562 P.2d 655 (1977). In *Higgins*, for example, because Centralia never enacted a civil service ordinance for its fire department, the examination for fire captain that resulted in the appointment of a captain was null and void. The civil service commissioners did not act as a de facto agency in the absence of a civil service ordinance.

In this case, the corporations do not have the status of de facto County agencies. The County did not enact ordinances making the corporations County agencies. This is not like the PRA where that statute expressly directs that entities that conduct public business like public

agencies must disclose public records. The corporations have failed to demonstrate that the de facto agency concept in Washington applies to them.

To understand the potential dramatic impact on the budgets at all levels of Washington government from the trial court's decision, this Court must understand the scope of contracting done by governments with private vendors for public services. Contracting with private corporations and others for the provision of public services is very common in Washington, both at the state and local level.[39] The State contracts for public defense services, child and adult care, mental health services, and foster care. State and local governments are required to put public work including construction, alteration, repairs, or improvements out to bid. RCW 39.04.010. This policy extends to services. RCW 39.29.[40] The

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[39] Government often considers the contracting out of services as a legitimate alternative to providing services through public employees. With the recent budgetary problems plaguing all units of government, conversations about contracting are common. King County has considered privatization of animal control services and public/private partnerships to operate parks. "County-Exec Proposal Cuts into Jobs, Parks," Seattle *Times*, September 29, 2009 at A-1. Pierce County is considering privatization of mental health services. "Pierce County to private mental-health services," Seattle *Times*, August 31, 2009 at B 1.

[40] RCW 41.06.142 provides that any state agency may contract for services traditionally provided by public employees. As indicated in *Washington Federation of State Employees v. Washington Dep't of General Administration*, ___ Wn. App. ___, 216 P.3d 1061 (2009), former restrictions on contracting out of public employee tasks were eliminated in 2002 in the Personnel Service Reform Act. *Id.* at 1067. If the trial court's test for PERS eligibility were adopted, the legislative intent to authorize contracting out of public employee jobs to private contractors would be frustrated.

state has often litigated with its contractors or service beneficiaries over the provision of such contracted services. *See, e.g., Washington Ass'n of Child Care Agencies v. Thompson,* 34 Wn. App. 225, 660 P.2d 1124, *review denied,* 99 Wn.2d 1020 (1983) (care for abused, neglected, disturbed children); *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 669 P.2d 476, *review denied,* 100 Wn.2d 1030 (1983) (nursing homes); *Pierce County v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008) (mental health services); *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003) (foster care services).

The County's defender services contracts are similar to the contracts entered into by other Washington counties for other services, CP 6303-6403,[41] but no Washington case has held that a governmental agency's exercise of fiscal and policy oversight of its contractors transformed that contractor into a public agency.

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[41] For example, Snohomish County regularly contracts with independent, nonpublic organizations such as the Boys and Girls Clubs of Snohomish County, Catholic Community Services of Western Washington, Lutheran Community Services Northwest, Providence Everett Medical Center, Salvation Army, and the Tulalip Tribes for the provision of services. CP 6300-6403. As in King County, the parties to the Snohomish County contracts specifically agree that the employees of the contractors are not employees of the County. CP 6315, 6359. Those contracts also establish performance standards and provide that the contractors' employees must have minimum levels of training, experience and licensure requirements, and they require the contractors to make regular reports to Snohomish County regarding the fulfillment of contracted-for services. *See, e.g.,* CP 6306-11, 6325, 6337-38.

Similarly, the federal government monitors the performance of thousands of government contractors receiving federal funds. CP 5452-53.[42] However, public funding of private entities, even when coupled with significant regulation, is not sufficient to convert private organizations into public agencies acting "under color of law" within the meaning of 42 U.S.C. § 1983.[43]

In sum, the corporations do not meet the strict definition of a PERS employer in RCW 41.40.010(4)(a). They are not de facto County agencies because the County has not made them County agencies. Historically, the corporations have been independent. Most critically, mere budgetary oversight and supervision of the contracts by the County, as required by RCW 10.101.060, does not convert the corporations into public agencies. If government funding and a public purpose for the expenditure were

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[42] Every federal contract of more than $10,000 a year contains mandatory requirements that are monitored and audited by the federal office of contract compliance. CP 5452.

[43] *See, e.g., Rendell-Baker v. Kohn,* 457 U.S. 830, 102 S. Ct. 2764, 73 L.Ed.2d 418 (1982) (private school did not act under color of state law, despite the fact that almost all of the school's pupils were referred by public school system, school received at least 90% of its funds from various government entities, and school was heavily regulated); *see also, Blum v. Yaretsky,* 457 U.S. 991, 1004-11, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982) (nursing home was not a state actor despite the fact that the nursing home was "extensively regulated" and was heavily subsidized by Medicare funds); *Morse v. North Coast Opportunities, Inc.,* 118 F.3d 1338 (9th Cir. 1997) (employee of nonprofit community action agency was not a state actor; government funding and extensive regulation without more does not convert private entity into governmental actor); *Kabbani v. Council House, Inc.,* 406 F.Supp.2d 1189 (W.D. Wa. 2005) (finding that landlord, a nonprofit corporation, was not a state actor even though it received Section 8 subsidies and was subject to government regulation).

sufficient to turn independent contractors into public employers, then literally tens of thousands of private employees working for government contractors in Washington would be PERS eligible.

(4) The Class Members Are Estopped From Claiming That They Are County Employees

The class members, or persons with whom they were in privity, have litigated the question of their relationship to the County and a court has decided that they are not County employees. The class members are thus estopped to claim they are County employees.

Collateral estoppel bars the relitigation of an issue by a party who has had a full and fair opportunity to present his or her case, even if the subsequent litigation presents a different claim or cause of action; the doctrine's purpose is to achieve finality of disputes, promote judicial economy, and prevent harassment of and inconvenience to litigants. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The doctrine applies only if four basic requirements are met: (1) the identical issue was decided in the prior action; (2) the first action resulted in a final judgment on the merits; (3) the party against whom preclusion is asserted was a party to or in privity with a party to the prior adjudication, and (4) application of the doctrine does not work an injustice. *Id.* at 562. The elements of the doctrine are met here.

As noted *supra*, in *White*, a former employee of NDA raised the question of whether King County could be deemed "the employer" of a person who worked for one of the corporations. White sued the County after NDA terminated his employment, arguing that the County was also his employer. CP 546. The County denied it was White's employer and filed a motion for summary judgment on that basis. *Id.* The court found there was not an employer-employee relationship between White and the County, and rejected the contention that the County was White's true employer. *Id. See* Appendix.

Thus, a member of the class litigated the identical issue, a final judgment on the merits was entered, and the application of the doctrine does not work an injustice. The court's determination in *White* that employees of one of the corporations were not King County employees carries preclusive effect. The class is estopped to claim the status of public employees under PERS.

The class is also estopped under equitable estoppel principles from claiming its members are County employees based on their participation in programs available *only* to private employees. The doctrine of equitable estoppel applies where a party has made an admission, statement or act that was justifiably relied upon to the detriment of another party. *Dep't of Ecology,* 146 Wn.2d at 19.

The corporations have consistently represented to the IRS, through their filings of IRS Form 990s and 5500s, that they are 501(c)(3) nonprofit organizations and that they have made retirement contributions on behalf of the class members as the members' sole employers. CP 5903-6168. The class members' acceptance of retirement benefits through 403(b) plans and the corporations' affirmative representations to the federal government bar them from now asserting a conflicting status as "public employees."

Further, the employees have participated in ERISA plans for their retirement benefits. ERISA does not apply to benefit plans involving governmental employees, 29 U.S.C. § 1003(b)(1), again evidencing the fact that the class members are not public employees.

Similarly, by organizing into labor unions subject to NLRB jurisdiction, the employees are estopped to claim they are public employees. Prior to asserting jurisdiction, the NLRB must determine whether an employer meets the particular definition of "employer" under 29 U.S.C. § 152(2). *Public employers are not subject* to the Act. 29 U.S.C. § 152(2) ("When used in this subchapter . . . the term 'employer' . . . shall not include . . . any state or political subdivision thereof.").[44]

[44] Public employers and employees in Washington are generally subject to the jurisdiction of the Public Employees Relations Commission. RCW 41.56.

N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 91 S. Ct. 1746, 29 L.Ed.2d 206 (1971). The United States Supreme Court looks to see if the organizations were "created directly by the state, so as to constitute departments or administrative arms of the government," or if they were "administered by individuals who are responsible to public officials or the general electorate." *Id.* at 604-05. Neither is true here. The Ninth Circuit decision in *Golden Day Schools, Inc. v. N.L.R.B.,* 644 F.2d 834 (9th Cir. 1981) is instructive. There, the Court held that a child care facility was not a public employer even though the state of California reviewed its budget, set academic standards, and largely funded the facility because the facility controlled the hiring, firing, and conditions of employment for the facility's staff. *See also, N.L.R.B. v. Parents & Friends of Specialized Living Center,* 879 F.2d 1442 (7th Cir. 1989) (intermediate care facility for developmentally disabled that was funded by the state and contracted with it was not public employer); *Staff Builders Services, Inc. v. N.L.R.B.,* 879 F.2d 1484 (7th Cir. 1989) (corporation providing chore services to elderly and disabled clients by contract with state was not public employer). The NLRB may not assert jurisdiction over King County or any other public employer.

The NLRB has asserted jurisdiction over NDA and TDA by certifying SEIU as the exclusive representative for their employees in the

bargaining unit and by investigating unfair labor practices charges filed by the SEIU. CP 6426-60. Similarly, the NLRB accepted two certification petitions from Teamsters Local 117 in 1996 and 1999, in the union's attempt to organize the employees of SCRAP, and assumed jurisdiction over the matter. CP 6413-21. While Teamsters lost the election and the union's efforts to organize SCRAP failed, the NLRB would not have accepted the petition or held the election if SCRAP was a public employer.[45]

Moreover, federal courts have specifically recognized in NDA's case that any disputes between NDA and its staff over wages are exclusively within the jurisdiction of the NLRA, foreclosing any action for retroactive back pay and benefits.

In *Larranaga*, the Ninth Circuit upheld a district court decision that claims for wages and benefits by NDA employees are preempted by federal labor laws. In 1999, two attorneys formerly employed by NDA filed a lawsuit claiming that NDA had wrongfully withheld annual wage increases mandated by the collective bargaining agreement between NDA and its union. NDA moved to dismiss in part, arguing the claims were preempted by the NLRA or Section 301 of the Labor Management

[45] The NLRB's assertion of jurisdiction over a particular employer may be challenged under the NLRA. 29 U.S.C. § 151 *et seq.* That has not happened here.

Relations Act. The district court agreed and entered an order of dismissal. The Ninth Circuit affirmed, noting that the plaintiffs were employees of NDA and that their claims were preempted by the NLRA.[46]

Larranaga lends further credence to the fact that the corporations are private, not public, employers because, by asserting jurisdiction in these instances, the NLRB has concluded that the corporations are private, not public, entities.

Where the issue of the status of the employees of one of the corporations has actually been litigated and they have been found by a competent court *not* to be King County employees, and the employees have taken actions such as seeking to organize under the NLRB's jurisdictions and obtaining benefits available *only* to employees of private companies, the County justifiably relied on the fact that the corporations' employees were private employees. The class is estopped from claiming that its members are public employees eligible for PERS.

F. CONCLUSION

The trial court erred in determining that the class members were eligible for PERS.

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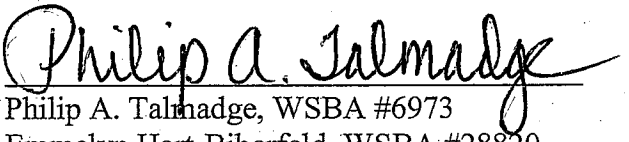
[46] Congress has entrusted administration of the NLRA to the NLRB to ensure the development and application of a uniform national labor policy. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 242-43, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959). The United States Supreme Court mandates preemption of state law claims whenever the underlying claim is "arguably" subject to the NLRA. *Id.* at 245.

This Court should reverse the trial court's judgment and remand with directions to the trial court to enter a judgment holding that the class members are not employees of a public employer and therefore are not eligible for PERS. Costs on appeal should be awarded to King County.

DATED this 24th day of November, 2009.

Respectfully submitted,



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APPENDIX

RCW 10.101.060:

(1)(a) Subject to the availability of funds appropriated for this purpose, the office of public defense shall disburse to applying counties that meet the requirements of RCW 10.101.050 designated funds under this chapter on a pro rata basis pursuant to the formula set forth in RCW 10.101.070 and shall disburse to eligible cities, funds pursuant to RCW 10.101.080. Each fiscal year for which it receives state funds under this chapter, a county or city must document to the office of public defense that it is meeting the standards for provision of indigent defense services as endorsed by the Washington state bar association or that the funds received under this chapter have been used to make appreciable demonstrable improvements in the delivery of public defense services, including the following:

(i) Adoption by ordinance of a legal representation plan that addresses the factors in RCW 10.101.030. The plan must apply to any contract or agency providing indigent defense services for the county or city;

(ii) Requiring attorneys who provide public defense services to attend training under RCW 10.101.050;

(iii) Requiring attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies. This subsection (1)(a)(iii) does not apply to cities receiving funds under RCW 10.101.050 through 10.101.080;

(iv) Requiring contracts to address the subject of compensation for extraordinary cases;

(v) Identifying funding specifically for the purpose of paying experts (A) for which public defense attorneys may file ex parte motions, and (B) which should be specifically designated within a public defender agency budget;

(vi) Identifying funding specifically for the purpose of paying investigators (A) for which public defense attorneys may file ex parte motions, and (B) which should be specifically designated within a public defender agency budget.

(b) The cost of providing counsel in cases where there is a conflict of interest shall not be borne by the attorney or agency who has the conflict.

(2) The office of public defense shall determine eligibility of counties and cities to receive state funds under this chapter. If a determination is made that a county or city receiving state funds under this chapter did not substantially comply with this section, the office of public defense shall notify the county or city of the failure to comply and unless the county or city contacts the office of public defense and substantially corrects the deficiencies within ninety days after the date of notice, or some other mutually agreed period of time, the county's or city's eligibility to continue receiving funds under this chapter is terminated. If an applying county or city disagrees

with the determination of the office of public defense as to the county's or city's eligibility, the county or city may file an appeal with the advisory committee of the office of public defense within thirty days of the eligibility determination. The decision of the advisory committee is final.

RCW 10.101.070:

The moneys shall be distributed to each county determined to be eligible to receive moneys by the office of public defense as determined under this section. Ninety percent of the funding appropriated shall be designated as "county moneys" and shall be distributed as follows:

(1) Six percent of the county moneys appropriated shall be distributed as a base allocation among the eligible counties. A county's base allocation shall be equal to this six percent divided by the total number of eligible counties.

(2) Ninety-four percent of the county moneys appropriated shall be distributed among the eligible counties as follows:

(a) Fifty percent of this amount shall be distributed on a pro rata basis to each eligible county based upon the population of the county as a percentage of the total population of all eligible counties; and

(b) Fifty percent of this amount shall be distributed on a pro rata basis to each eligible county based upon the annual number of criminal cases filed in the county superior court as a percentage of the total annual number of criminal cases filed in the superior courts of all eligible counties.

(3) Under this section:

(a) The population of the county is the most recent number determined by the office of financial management;

(b) The annual number of criminal cases filed in the county superior court is determined by the most recent annual report of the courts of Washington, as published by the office of the administrator for the courts;

(c) Distributions and eligibility for distributions in the 2005-2007 biennium shall be based on 2004 figures for the annual number of criminal cases that are filed as described under (b) of this subsection. Future distributions shall be based on the most recent figures for the annual number of criminal cases that are filed as described under (b) of this subsection.

RCW 41.40.010(4)(a):

"Employer" for plan 1 members, means every branch, department, agency, commission, board, and office of the state, any political subdivision or association of political subdivisions of the

state admitted into the retirement system, and legal entities authorized by RCW 35.62.070 and 36.70.060 or chapter 39.34 RCW; and the term shall also include any labor guild, association, or organization the membership of a local lodge or division of which is comprised of at least forty percent employees of an employer (other than such labor guild, association, or organization) within this chapter. The term may also include any city of the first class that has its own retirement system.

RCW 41.40.010(22):

"Employee" or "employed" means a person who is providing services for compensation to an employer, unless the person is free from the employer's direction and control over the performance of work. The department shall adopt rules and interpret this subsection consistent with common law.

Wash. Admin. Code 415-02-110

WASHINGTON ADMINISTRATIVE CODE
TITLE 415. RETIREMENT SYSTEMS, DEPARTMENT OF
CHAPTER 415-02. GENERAL PROVISIONS
GENERAL RULES AFFECTING MULTIPLE PLANS AND SYSTEMS

Current with amendments adopted through January 7, 2009.

415-02-110. Determination of employee status.

(1) An employee of a retirement system employer, other than a teachers' retirement system plan I retiree, who otherwise meets the eligibility criteria to participate in a state-administered retirement system is required to establish or continue membership in that system. An independent contractor is not eligible for active membership in any state-administered retirement system.

(2)(a) The department will review the entire relationship between the worker and the retirement system employer in order to determine whether a worker is an independent contractor or an employee. Generally, a worker is an employee if the employing individual or entity has the right to control and direct the work of the worker, not only as to the result to be accomplished, but also as to the means or methods by which the result is accom- plished.

(b) Generally, a worker is an independent contractor if the employing entity has the right to control or direct only the result of the labor or services and not the means and methods accomplishing the labor or services.

(c) Whether or not the parties intend to establish an employer-employee relationship, or whether the parties regard the worker as being an independent contractor is not controlling. When the elements of direction and control are present in determining the means and methods of performing the worker's labor or service, any disclaimers to the contrary are not binding on the department for the purpose of determining employer-employee status. The terms of the contract and the actual arrangement under which the labor or services are performed will determine whether a worker is an employee or independent contractor.

(d) In evaluating whether the retirement system employer has direction or control over the means and methods of performing the worker's labor or services, no one factor is determinative. The department will apply several factors, including but not limited to the following:

(i) Is the worker required to comply with detailed work instructions or procedures about when, where and how the worker must perform services? An employer has control if the employer requires or has the right to require the worker to comply with instructions about the manner in which services must be performed.

(ii) Does the employing individual or entity provide free training for the worker, or have the right to train the worker? Typically, an employer would have the right to train an employee but not an independent contractor.

(iii) Are the worker's services an integral part of the employing individual's or entity's business operation? Usually the regular administrative work of a business is performed by employees rather than independent contractors. Services outside the usual course of the employer's business may imply independ-

ent contractor status.

(iv) Is the worker required to perform the labor or services personally? While employees are typically required to personally perform labor or services, independent contractors are not necessarily required to perform personally, but may subcontract part or all of the required labor or services to another party.

(v) Does the employer hire, supervise or pay others to perform the same job as the worker? Usually a person who works the same job or performs the same function as performed by employees of the employer is an employee rather than an independent contractor.

(vi) Does the worker hire, supervise and pay others on the job under a contract to furnish labor and materials? Independent contractors may or may not be responsible for performing the contracted labor or services themselves, and usually have the right to hire and terminate their own employees who perform the contracted labor or services.

(vii) Does the worker perform continuing services for the retirement system employer? Independent contractors are typically hired for a job of relatively short-term or temporary duration and do not have a continuous relationship with or perform continuing services for the employing entity.

(viii) Are the worker's hours, routine or schedule set by the employing entity? The establishment of a set routine or schedule for the worker by the employer indicates employee status. Independent contractors are typically free to set their own hours of work.

(ix) Is the worker required to devote his or her full time to the business of a single employing individual or entity? A worker who is required to work full time for a single employer is likely to be an employee. Independent contractors are usually free to provide labor or services for two or more employing entities concurrently.

(x) Does the employing individual or entity require the worker to perform labor or services on the employer's premises? The employing entity is likely to have the right of control over the worker's method of work if the work is performed solely on the employer's premises, particularly if the worker could perform the required labor or services elsewhere.

(xi) Does the employing individual or entity require the worker to perform labor or services in a set sequence? A worker is likely to be an employee if the worker must perform work in an order or sequence set by the employer.

(xii) Is the worker required to provide regular, oral or written reports to the employer? Regular reports, for example weekly time sheets, are usually required of employees as opposed to independent contract- ors.

(xiii) Is the worker paid by unit of time (hour, week or month)? Employees are typically paid by unit of time while independent contractors are typically paid by the job (commission, bid, piecework or lump sum). Payment for labor or services upon completion of the performance of specific portions of a project or on the basis of an annual or periodic retainer usually indicates independent contractor status.

(xiv) Does the employing individual or entity reimburse the worker for the worker's job-related expenses? Independent contractors typically pay their own business or travel expenses; the regular ex-

penses they incur as part of providing labor or services are generally included in the stipulated contract payment and are not reimbursed by the employing entity.

(xv) Does the worker providing labor or services furnish the tools and supplies necessary for the performance of the contracted labor or service? Generally, an employer furnishes tools and supplies for their employees while independent contractors furnish their own.

(xvi) Has the worker invested in the equipment or facilities used in performing the labor or services? A significant investment by the worker in the equipment or facilities used in performing the labor or services usually indicates independent contractor status.

(xvii) Does the worker have a right to realize a profit or have a significant risk of loss as a result of the worker's services? Having the right to a profit or the risk of loss arising from the worker's services implies independent contractor status. The worker may be presumed to have assumed the risk of loss if the worker assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of a performance bond, warranties, errors, and omissions insurance or liability insurance relating to the labor or services provided.

(xviii) Does the worker perform services for several persons or firms concurrently? Performance of services for a number of different unrelated clients indicates independent contractor status.

(xix) Does the worker offer services to the general public on a regular or consistent basis? An individual actively advertising services to the general public and representing to the public that the labor and services are to be provided by an independently established business is typically an independent contractor. The following are evidence of 'actively advertising':

(A) The worker uses commercial advertising or business cards as is customary in operating a similar business, or is a member of a trade association;

(B) The worker uses a telephone listing and service for the business that is separate from the worker's personal residence listing and service.

(xx) Does the employer have the right to discharge the worker at will? An employee is typically subject to discharge or layoff at the will of the employer.

(xxi) Does the worker have the right to terminate the employment relationship without incurring liability? The right to terminate the work relationship at will usually indicates employee status.

(3) Typically, an independent contractor works for an employing individual or entity as a specialist in an independently established occupation, profession, trade or business. While the right of control over the method or means of work is determinative, the department shall also consider the following factors in evaluating independent contractor status. The degree of importance of each factor varies depending on the labor or services to be performed and the context in which the labor or services are performed.

(a) Does the worker perform labor or services only pursuant to written contracts?

(b) Has the worker providing labor or services attained business registrations, professional occupation licenses or certificates required by state law or local government ordinances to perform the contracted labor

Wash. Admin. Code 415-02-110

or services?

(c) Has the worker providing labor or services:

(i) Purchased worker's compensation insurance and paid taxes required for an independent business;

(ii) Filed income tax returns in the name of an independent business; or

(iii) Filed a Schedule of Expenses for the type of business conducted or a Business Schedule C or Farm Schedule F as part of the personal income tax return for the previous year if the worker performed the labor or services as an independent contractor in previous years?

(d) Does the worker providing labor or services maintain a separate set of books or records that reflect all items of business income and expenses as an independently established business?

(e) Has the worker assumed financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of a performance bond, warranties, errors and omissions insurance or liability insurance relating to the labor or services to be provided?

(4) The burden of persuasion in claiming that a worker is an independent contractor or an employee is on the worker or employer making the claim.

Statutory Authority: RCW 41.50.050. 94-09-039, S 415-02-110, filed 4/19/94, effective 5/20/94.

<General Materials (GM) - References, Annotations, or Tables>
WAC 415-02-110, WA ADC 415-02-110

WA ADC 415-02-110
END OF DOCUMENT

NO. 82842-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN DOLAN and a class of
similarly situated individuals,

Respondents,

v.

KING COUNTY, a political subdivision of
the State of Washington,

Petitioner.

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ENTERING FINDINGS

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The Honorable John R. Hickman
Friday, May 22, 2009
3:00 p.m.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KEVIN DOLAN and a class of similarly situated individuals, Plaintiffs, v. KING COUNTY, a political subdivision of the State of Washington, Defendant.	NO. 06-2-04611-6 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

NATURE OF THE CASE

The plaintiff Kevin Dolan is a King County public defense attorney. He brought this class action lawsuit against King County on behalf of the lawyers and the staff of the King County Public Defense Agencies. The Court certified a class defined as:

> All W-2 employees of the King County public defender agencies and any former or predecessor King County public defender agencies who work or have worked for one of the King County public defender agencies within three years of the filing of this lawsuit.

Dolan and the class (collectively, plaintiffs) contend that King County breached its duty to enroll them in the Public Employees Retirement System (PERS) and failed to make the required PERS contributions to the Department of Retirement Systems (DRS). King County denied liability and denied that Dolan and the Class were due any damages

The parties agreed on the procedure and the Court thus ordered that this class action would

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be addressed in phases, first liability and later, if liability is found, relief will be addressed in the second phase. The parties and the Court agreed that the liability phase would be addressed by cross-motions for summary judgment and, if liability could not be determined on these motions, the case would be tried by the Court.

The parties filed cross-motions for summary judgment on liability supported by written evidence in the form of deposition testimony and exhibits, and declarations and exhibits. The Court denied the parties' cross-motions because material facts were in dispute.

The parties filed a joint motion for reconsideration or alternatively for the Court to try the liability phase of the case on the evidence submitted by the parties in support of summary judgment. The Court denied reconsideration, but agreed to try the case on the existing summary judgment record, as requested by the parties.

In this trial on the record, the Court reviewed a very large and comprehensive body of evidence, consisting of about 6,000 pages of testimony and exhibits. The County submitted about 1,400 pages of deposition testimony from 11 witnesses and declarations from 7 witnesses. Those depositions and declarations incorporated about 2,700 pages of exhibits. The plaintiffs submitted declarations for 10 witnesses with nearly 2,000 pages of exhibits.

The Court heard opening statements on November 3, 2008 and closing argument on November 10, 2008. The claim tried by the Court is whether plaintiffs are King County employees within the meaning of PERS. The Court issued a written decision on February 9, 2009, finding that plaintiffs are King County employees for the purpose of the PERS statute.

The Court is now issuing findings of fact and conclusions of law under CR 52(a)(1) and CR 65(d) to set forth the material facts on which the February 9, 2009 decision and the permanent injunction are based.

FINDINGS OF FACT

1. King County has a mandatory constitutional and statutory duty to provide indigent defense. The four King County public defense agencies – The Defender Association (TDA),

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Associated Counsel for the Accused (ACA), Society of Counsel Representing Accused Persons (SCRAP), and Northwest Defenders Association (NDA) – all perform this governmental function for King County.

2. The agencies receive all or nearly all of their funding from King County.

3. The public defense agencies were effectively created by the government to serve the government in providing indigent legal representation. They were organized as nonprofit corporations with the limited purpose of providing indigent public defense because the County required them to be nonprofit corporations with that limited purpose.

4. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), TDA was created as a nonprofit corporation in 1969 to organize indigent public defense by the City of Seattle and the federal government through the federal Model City program. ~~In 1970, King County took over the financing and administration of public defense after it was determined that public defense is a County duty~~. Initially, TDA was the County's sole public defense agency.

5. ACA was established as a King County public defense agency in 1973, and started providing public defense services that year.

6. SCRAP was created in 1976, at the County's request, to provide representation in juvenile cases and it started providing those services in 1976.

7. NDA was created for the County during the County's 1987 budget process, ~~to provide the County with a minority-run public defense firm. The County did not issue an RFP for a minority-run firm. Rather,~~ NDA was added as a public defense agency by the County in 1987, during the County's budgetary process for the 1988 budget. The County then assigned cases to NDA in 1988, cases that the County would have otherwise assigned to the other agencies.

8. King County's public defense system is unique in the nation and the quality of King County's public defense has been highly praised. The King County Public Defender is a County officer, V. David Hocraffer. He is an attorney and is the head of the King County Office of the Public Defender (OPD) (formerly called the King County Office of Public Defense). OPD

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screens individuals for financial eligibility for appointed counsel and assigns the cases to one of King County's four public defense agencies. OPD is a division within a County department, the Department of Community and Human Services, which is part of the Executive Branch.

9. The County exerts control over the agencies through its allocation of cases and assignment of cases to the public defense agencies.

10. The County assigns cases to one of the agencies, unless they have a disqualifying conflict of interest, in which instance the case is assigned to one of the attorneys in private practice on the County's panel of attorneys to represent indigent defendants. An agency cannot refuse a case assigned to it by the County unless it has a disqualifying conflict of interest. A panel attorney, in contrast, can refuse a case. A defendant cannot choose which public defense agency will provide representation.

11. The County assigns cases to each agency based on the type of case and the market share (percentage of cases) the County allocates to each agency for that type of case, *e.g.*, felonies, district court misdemeanors, juvenile cases, involuntary treatment, etc. Each year the County ~~tells~~ NEGOTIATES each agency how many cases it will get in each area. ~~The agencies do not compete for shares or allocations.~~

12. The County has changed these allocations somewhat over time. For example, initially TDA had a greater share of felonies and SCRAP had a greater share of juvenile and dependency cases. ~~Neither TDA nor SCRAP sought to have a smaller percentage of these types of cases they had. Each agency tried to retain its existing percentage of the types of cases, but the County changed its allocation of such cases to the agencies.~~

13. Similarly, after NDA lost its Seattle misdemeanor caseloads because the County no longer contracted for the Seattle Municipal Court, the County took six attorney caseloads from SCRAP, ACA, and TDA and assigned them to NDA to keep its caseloads up. The agencies losing those six attorney caseloads protested, but the County made the change anyway.

14. The County-assigned percentages for each public defense agency is determined in

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the County's annual budget process for County departments, divisions and agencies. After the budget is adopted, the types of cases and the percentage each agency will receive is stated in the County's contract with each agency.

15. The County also assigns certain court calendars or defense functions to particular agencies, *e.g.* arraignments, domestic violence, out of custody, SRA modifications, etc. This also occurs as part of the County budget process and is later stated in the annual contracts.

16. The King County Superior Court operates out of three courthouses: the main courthouse in Seattle (KCCH); the Regional Justice Center in Kent (RJC), and the Juvenile Court in Seattle. The County also has several district courts. The County decides which agencies will handle cases in which court and how many cases each agency will have in that court. The County has changed these assignments somewhat over time, and added TDA to join SCRAP and NDA to perform work at the RJC.

17. The County also exercises control through its annual budget process. This budget process for the public defense agencies is really no different than for any other public agency that submits a budget to the Executive and/or County Council. In fact, starting around at least 1989, the County used the same budget method for the public defense agencies that it uses for other County departments, agencies and divisions.

18. Each year OPD sent each public defense agency a proposed detailed line-item budget based on the previous year's actual expenditures. The public defense agencies submitted to OPD their anticipated costs – based on last year's actual costs – in the detailed line-item areas, including listing the salaries and benefits for each public defense attorney and staff. If there were mandatory increases (such as increased caseload, new case areas, increases in rent, etc.), these costs were added by the County. If the County was undergoing a budgetary shortfall, OPD, like every other County agency, would be given a percentage reduction~~ to achieve, e.g., 5% reduction~~ in last year's budget, ~~a reduction which the four public defense agencies had to match in their proposed budgets to OPD so that the public defense budget would have the County required~~

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~~percentage reduction.~~

19. ~~In the budget, the County provided the agencies the same employee cost-of-living adjustment (COLA) given County employees, and required the agencies to pass through that exact cost-of-living adjustment to the public defense attorneys and staff.~~

20. ~~The detailed line-item budget approved by the County Council was then incorporated into each agency's contract. The contract provided that the agencies had to adhere to the budget. If the agencies did not spend the amount allocated for a line item, such as training or rent, the line items would be reduced the next year.~~

21. To show compliance with the County budget, each agency had to submit to the County monthly expenditure reports tracking the line items in the approved budget incorporated in the contract and quarterly position salary reports tracking each attorney's salary and each staff member's salary as it had been approved in the County budget and incorporated into the contract.

22. ~~King County recently changed its budgeting method to one that treats the four public defense agencies as one agency, but it still treats the agencies as if they were a part of the County for purposes of the budget. The County's change in its budgeting method for the agencies is not material and the County could also at any time return to its previous budget approach.~~

23. Just as it does for other parts of the County government, the funding for each of the four public defense agencies is determined by the County each year in the County's budget for the next year, *e.g.*, the 2008 budget adopted in 2007 determines the 2008 funding for each public defense agency. After the budget is approved, the County contracts with each of the public defense agencies for the next year. The contract amount is based on the County-approved budget.

24. The contract is sometimes not completed before the next year begins, and the County has the agencies sign a one-page County form called "Intent to Contract," which allows public defense services to continue without a contract by following the County-approved budget for each agency. Sometimes the actual contract is not effective until after the end of the year it covers or until a substantial portion of the contract year has passed.

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25. The County also exercises control and acts like an employer by setting pay rates and job classifications and by monitoring the agencies to assure that they adhere to these requirements. King County determines the salary for public defense attorneys to provide parity in salaries between public defense attorneys and deputy prosecuting attorneys. The County uses the "Kenny scale" for public defense attorneys and deputy prosecuting attorneys. The Kenny scale was developed by the County as a result of a study that the County commissioned. The County commissioned the Kenny Group to study prosecutors and public defenders, classify their positions, and establish pay classifications with pay parity for public defenders with prosecutors. The study did not address benefits, only base salary.

26. The Kenny study developed job descriptions, education and experience requirements for each attorney classification, both prosecutors and public defenders. It also established a salary schedule – called the "Kenny scale" – with pay steps for each classification providing pay parity for prosecutors and public defenders.

27. The Kenny salary scale was adopted by the County Council in Ordinance 9221 in 1989. The County Council required pay parity for public defense attorneys with prosecutors, using the Kenny scale and attorney classifications. After the County Council adopted the Kenny scale, the County incorporated it into the County-approved budget for each agency and incorporated the scale directly into its annual contracts with the agencies. The County updates the scale each year and includes the cost of living increase given to County employees. The Kenny scale has been used by the County for over 18 years and is still in effect.

28. The County monitored the agencies to assure that they complied with the Kenny scale and they provided the plaintiffs with the same cost of living adjustment that the County provided to other County employees, including prosecutors.

29. King County directed the Kenny group to conduct a similar study and classification of public defense agency staff, which was completed in 1990. The Kenny Group reclassified the public defense agency staff and set their base pay so that it would be raised to be comparable to

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County employees performing similar work. The County Council did not adopt the pay parity for public defense staff at that time. County budgets for the agencies thus did not provide enough money to have pay parity for the non-lawyer defense staff with their counterparts in the prosecutor's office or other parts of the County.

30. ~~Although pay parity for the staff was not provided, the County set the pay rates for~~ the agency staff through its annual budget process and through its contract which required ~~the agencies to submit to the County position salary reports for attorneys and staff so that the County would monitor the pay. The agencies were required to submit position salary reports each January and every quarter thereafter as part of their contracts with the County.~~

31. In 1999, King County completed an internal study classifying the public defense agency staff and determining the rate of pay for the classifications. The County appropriated additional funds to move toward pay parity for staff, and County budget and contracts with the public defense agencies incorporated these changes.

32. The County also effectively controlled benefits through budgets and contracts. The County-approved budgets each year for the County public defense agencies included line items for "benefits" for the lawyers and the staff. The County characterized "employee benefits" as including mandatory employer taxes, *e.g.*, FICA, FUTA, worker's compensation, and unemployment. Thus, the amount set by the County for employee benefits other than employment taxes was actually lower than stated in the budgets. The actual employee benefit funds that the County provided the agencies is almost entirely used for health insurance premiums. Some agencies were able to sometimes to make a small retirement contribution to the agencies' retirement plans if they had some left-over savings at the end of the year, beyond what the County required for reserves.

33. The County's contention that the public defense agencies can manage their own monies as they see fit, including developing 401(k) plans or something similar, is illusory when, despite their requests, they were not provided the funds to adequately establish a pension plan

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similar to PERS. The benefits the County funded did not provide parity with County employees, such as employees of the Prosecutor's Office. With the funds provided by the County the agencies could not afford to fund a defined benefit plan such as PERS. Instead, the agencies established retirement savings plans, into which employees could make tax-deferred retirement contributions from their own pay. These self-directed employee-funded plans are not comparable to a PERS-type defined benefit plan.

34. The County's monetary control through the budget process, reservation of powers to audit and ultimately dismember a public defense agency, and the County's authority to allocate cases among the agencies gives the County control over the public defense agencies and plaintiffs. ~~This control is illustrated in part by the County's actions regarding the Eastside Defender Association, SCRAP and NDA.~~

35. ~~Eastside was established as a King County public defense agency in 1978. In 1984, the County audited Eastside. The audit found self-dealing by the Managing Director and founder Jerry Parks, but no fault was found with the public defense attorneys' representation. What Eastside and its director had done was apparently not illegal or in violation of the contract, but the County decided that it would no longer allow Eastside to be a public defense agency. Because the County was its sole source of funding, Eastside ceased to exist in 1985.~~

36. ~~The County assigned Eastside's caseload to the remaining public defense agencies -- TDA, SCRAP, and ACA, with ACA growing the most and obtaining a new practice area, juveniles. The plaintiff Kevin Dolan was a King County public defense attorney with Eastside. When the County said it would no longer allow Eastside to be a public defense agency, Dolan became a public defense attorney with ACA, taking his existing cases from Eastside to ACA.~~

37. ~~After auditing Eastside, the County audited SCRAP, TDA and ACA. The County's audit of SCRAP found that Roberts Nickels was the President of the SCRAP Board, that he held the two existing corporate membership certificates, that he was also the managing director, and~~

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that SCRAP leased office space and furniture and equipment from Nickels.

38. The County told SCRAP that Nickels had to resign as managing director, as President of the Board of Directors, and as a member of the board, and he had to relinquish his membership certificates to two people approved by the County. The County required SCRAP to change the members of its Board of Directors, removing some members and appointing new board members who were suitable to the County. The County permitted Nickels' employment by SCRAP to continue for two years, but only on condition that the County approve Nickels' employment contract. The County also required its approval for the office and equipment leases.

39. Because County funding was SCRAP's sole source of income and without the County contract SCRAP would cease to exist (as Eastside had), SCRAP complied with the County's demands. SCRAP made the County-required changes to its management, membership and Board of Directors, amended its Bylaws, submitted Robert Nickels' employment contract and its leases to the County for approval, and complied with the County's additional conditions.

40. In 2002, NDA asked the County to approve a new lease for office space in downtown Seattle. The County turned down NDA's request because the space was of better quality than the County would itself rent and rent was more than the County wanted to pay. NDA leased the space without the County's permission.

41. The County then audited NDA. The audit found in addition to leasing an office without County permission, NDA had set up a for-profit affiliate using a portion of its savings and it did not have a working board. NDA replaced its board, its for-profit affiliate returned the funds to NDA, and NDA ended its affiliation with the for-profit group.

42. The County decided that NDA's response was not adequate and in August 2002 the County filed suit against NDA and asked the court to place the agency under the control of a receiver. The County's complaint summarized the audit, alleged that NDA was still incorrectly organized because the new Board of Directors was improperly appointed by NDA management, and asserted that NDA had breached its contract with the County. The County sought the removal

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of NDA's Board of Directors and management, appointment of a receiver, and restitution of funds "misappropriated or mismanaged" by NDA's management, or alternatively dissolution of NDA and return of any funds held by NDA to the County.

43. NDA defended on the basis of its independent contractor status stated in the parties' annual contract. NDA and individual defendants argued that the County had no standing or any legal basis for seeking a receivership and removal of NDA managers and directors since NDA was only a contractor with the County and there was currently no contract.

44. ~~The County replied through Jackie MacLean, the director of King County Department of Community and Human Services (DCHS), of which the Office of Public Defense (OPD) is a unit, that:~~

> DCHS has not notified NDA that it intends to terminate any contract with NDA at this time. However, based upon NDA's "response" to the audit report and the fact that NDA has failed to cure any of the issues identified therein, DCHS has determined that it will not continue to fund NDA after expiration of the Statement of Intent on December 31, 2002, unless a receiver is appointed. Furthermore, at such time, in accordance with the provisions of the Contract, DCHS will demand that NDA remit the balance of its reserves to DCHS and to the extent permitted by the applicable courts, withdraw from all cases assigned to it by OPD.
>
> Pursuant to Section 2.60.040 of the King County Code, DCHS may contract only with nonprofit corporations formed for the *specific* purpose of rendering legal services to persons eligible for representation through OPD. I have attached a true and correct copy of KCC 2.60.040 as Exhibit 3. Thus, if NDA is engaged in providing in any other form of legal representation – whether for profit or pro bono – DCHS is prohibited by law from continuing to fund NDA.
>
> NDA's governing instrument originally only contemplated indigent defense. The King County Code does not permit DCHS to contract with an agency involved in anything besides public defense.
>
> * * *
>
> All of the funds currently held in reserve by NDA, in fact all of NDA's funds in general, are funds paid by the taxpayers via DCHS for the sole purpose of indigent defense. Any funds that NDA has maintained in reserve by mandate of the Contract, or by virtue of its management's under-staffing cases to run the agency at a profit, constitute a charitable trust fund to be held for the benefit of the King County taxpaying public.... [Footnotes and record citations omitted.]
>
> DCHS will not deal with NDA's current, hand picked "board members." We did not discover that NDA did not have a Board of Directors or that McKee

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and Mills had selected their own members until the audit. Before such discovery, NDA had represented to DCHS that it had a lawfully constituted Board.

If Mills has engaged in a practice of family law in Pierce County while in the employ of NDA as its Deputy Director, this would be inappropriate even if done on a pro bono basis. While the clients may have not paid for his time or services, DCHS did as it was then paying his salary as an employee of NDA. DCHS will not underwrite Mills' or any other NDA attorney's "pro bono" activities in other courts. DCHS pays NDA's employees to undertake indigent defense in cases assigned by OPD in King County and the City of Seattle. DCHS will not provide funds to NDA so that it may engage in other legal representation in other counties and municipalities. NDA cannot use public funds paid by DCHS for the benefit of King County taxpayers in this manner.

If NDA asserts that the reserves it is holding can be used by it for any purpose, DCS would object. The use of those reserves is restricted to indigent defense of OPD-assigned cases and may only be used for such purposes [Emphasis in original; paragraph numbers deleted.]

45. The County also took the position in the NDA litigation that the agency's reserves belonged to the County, not to the agency:

DCHS has never agreed any "surplus" of funds paid under Contract for the representation of indigents may be kept by NDA to use for any purposes for which it sees fit. The first page of the Contract provides, "any and all funds provided pursuant to this Contract are provided for the *sole purpose* of provision of legal services to indigent clients of the Agency [NDA] [emphasis by County]." DCHS has an interest in that reserve – the money is for indigents, not for NDA's expansion. DCHS' interest entitles it to a receiver.

DCHS' right to NDA's funds, both operating and reserve, is further secured in Section XIII.E of the Contract which provides that in the event DCHS terminates the contract because of the "misappropriation of funds" or "fiscal mismanagement," NDA "shall return to the County those funds, unexpended or misappropriated, which, at the time of termination, have been paid to the Agency [NDA] by the County." "Misappropriation of Funds" is defined under Exhibit V to the Contract as "the appropriation of funds received pursuant to this Contract for purposes other than those sanctioned by this Contract." Id.

In its response to the audit, NDA admitted it paid funds received under the Contract for services rendered to or on behalf of The Law Group PLLC ("TLG").

46. The trial court granted the County's motion for appointment of a receiver, and on the County's motion appointed Jeffery Robinson, an experienced criminal defense attorney, as receiver. The County had solicited Robinson to be the receiver before bringing suit.

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47. Robinson sought court approval for almost every action that he took as receiver. Before he sought court approval, Robinson sought King County's approval, because if the County did not approve his actions, it would not contract with NDA, thereby ending its existence. Robinson thus sought the County's approval of Eileen Farley as the Executive Director of NDA before he appointed her and obtained court approval for the appointment.

48. ~~King County told Robinson that the County would not contract with NDA if either of the two prior lawyer/managers remained with NDA. Robinson promptly removed the one prior lawyer/manager who was managing NDA, and did not permit the other to renew involvement.~~

49. Shortly after the receiver was appointed, King County sent NDA a Notice of Material Breach, triggering the County's corrective action procedures. The Notice said that NDA had breached its contract and the contract would be terminated if NDA did not remedy the breach, thereby ending NDA's existence since the County was its sole source of funds.

50. The notice repeated the grounds on which King County had sought appointment of a receiver, and required that the receiver restructure NDA to the County's satisfaction. The County required NDA to discharge the two lawyers who had been directing and managing NDA (which Robinson had already done), obtain new board members that were satisfactory to the County, terminate or renegotiate its two leases, write and adopt new Bylaws and Articles of Incorporation, review financial records for possible inappropriate expenditures, obtain reimbursements of any such expenditures and write new employee policies and procedures.

51. ~~After determining that the three existing board members were upstanding members of the minority community, Robinson wanted to retain them as NDA board members, while adding new additional board members. The County, however, said that the three existing board members could not be NDA board members. Consequently, Robinson discharged them, added new board members and obtained the County's approval for them as board members before they were added.~~

52. King County required that the receiver amend the NDA bylaws and articles of

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incorporation to limit its activities to only public defense. ~~The County's lawyer prepared the amending language, modifying what the receiver had proposed.~~ King County also required that NDA's Board of Directors adopt the King County Code of Ethics, and that NDA also include it in NDA's Employee Handbook and provide a copy to each NDA employee. ~~NDA also rewrote its employee handbook to include the many other County required provisions for employees.~~

53. ~~The County actions with regard to Eastside, SCRAP and NDA are not isolated incidents. The County has used its powers, including its corrective action procedures, to require the agencies to make a variety of changes to their internal operations.~~

54. The County contends that the agencies are nevertheless "independent contractors" as stated in the contracts. The County points to the fact that the agencies are organized as nonprofit corporations with articles of incorporation, bylaws, board of directors, who hold meetings, create minutes for these meetings, as proving their independent contractor status. The County also points to the fact that the agencies file IRS form 990s (a form used by nonprofit corporations to report their yearly income and expenses) and form 5500s (a form used to report their expenditures for employee benefit plans) show that the agencies are "independent contractors." These forms, however, are not binding and show only that the agencies are organized as nonprofit corporations, not that they are independent contractors, and the Court finds, based on the evidence, that the agencies are not independent contractors for purposes of this litigation due to many restrictions and controls placed on them by the County. They are the functional equivalent of a County agency or subagency and/or alter ego of the County.

55. A true independent contractor, for example, would not need permission to obtain an office lease. King County required the public defense agencies to submit office leases to the County for approval prior to signing. In fact, the County brought a receivership case against NDA and used its corrective action procedures to require NDA reorganization in part because NDA leased office space after the County disapproved of that lease.

56. The County assigns the cases and determines the market share (percentage of cases)

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that each agency receives. There is no competition among the agencies for cases or market shares. The County also does not allow the public defense attorneys to do other work, for pay or pro bono, except with its permission, as is shown by its action against NDA. The public defense attorneys are required by the County to perform their services personally. They cannot subcontract their work and neither can the staff. The County also does not allow the agencies to subcontract the defense work except with County permission and no such permission has ever been granted. A true independent contractor would not have these restrictions.

57. The County restricts the agencies to being nonprofit corporations with the limited purposes of providing indigent public defense. It prohibits them from contracting with anyone except another public agency or municipal government for public defense or public defense related work. A true independent contractor would be able to contract for sources of revenue other than indigent public defense (*e.g.*, represent retained clients or provide services to private clients on a sliding scale or develop some source of revenue other than criminal defense).

58. The County also restricts the agencies from having any affiliated entities, either nonprofit or for-profit. A true independent contractor would not be so restricted. In fact, the County put NDA into receivership and required it to be reorganized in part because it had created a for-profit affiliate.

59. The County assigns some criminal cases to attorneys in private practice who are selected by the County to be its Assigned Counsel Panel. These attorneys are genuine independent contractors. The County treats the Assigned Counsel Panel Attorneys and the public defense agencies and public defense attorneys differently. The County does not have control over the Panel Attorneys. It just assigns them a case which they can accept or reject. In contrast, the County exercises a great deal of control over the public defense agencies and plaintiffs.

60. These County restrictions assure that the agencies' sole (or virtually sole) source of revenue is from the County for indigent public defense. Because the County provides all (or nearly all) their revenue, the agencies lack any ability to engage in meaningful arms'-length

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bargaining with the County about the essential terms, such as benefits, because their only alternative to acquiescing in the County's demands is to end their existence.

61. ~~Although~~ the board of directors for each agency approves the County's contract with the agency. ~~this approval is just a matter of form.~~ However, The agencies have no ability to negotiate the essential contract terms. The actual contract price is predetermined by the County's budget process the year before the contract, and is not a negotiated item. The County contract is then offered on a take-it-or-leave basis. The agencies have no power or ability to reject the County's take-it-or-leave offers because their existence depends solely on County funding and the County prevents them from having any other source of revenue.

62. The 2003 contract "negotiation" is illustrative. The County had the agencies sign its "intent to contract" forms for 2003 incorporating the budgeted amount for each agency approved in 2002. Eventually the County gave the agencies a proposed 2003 contract. The agencies and their board of directors strongly objected to the County's proposed contract. It contained numerous new detailed provisions to which the agencies objected, including termination without cause and inspection of all client files by the Public Defender, which the agencies thought violated ethical rules because the four agencies the Public Defender supervised have clients with conflicting interests. The directors of the agencies and board members met with the County officials, including the Public Defender and head of the Department, Ms. MacLean, but the County would not agree to remove the offending provisions. ~~The NDA receiver, Mr. Robinson, tried to meet with the County Executive about the agencies' objections, but the Executive would not meet with him, leaving the matter to his subordinates~~. The agencies' boards decided not to sign the contract, but the County told the agencies in September 2003 they either signed the contract as is or the County would terminate their contracts. The boards and executive directors then reluctantly signed the contract because otherwise their agencies would cease to exist.

63. Although the organizational structure of the public defense agencies appears to show they are independent organizations, the substance of their relationship with King County

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shows the agencies lack genuine independence. They are not independent contractors.

64. The County also contends that for purposes of PERS it cannot be an employer of the plaintiffs and the plaintiffs cannot be County employees because it does not exercise day-to-day control over either the agencies or the plaintiffs. The Count finds that day-to-day control is not critical here for several reasons.

65. ~~Neither the public defense agencies nor the County can exercise direct control over how public defense attorneys handle an indigent defendant's case. Public defense attorneys, even more than other professionals, cannot be subject to day-to-day employer control because of their constitutional and ethical duties to their clients. They must be independent in their representation.~~

66. The public defense agencies have significant, but not complete, control over their day-to-day operational matters. The day-to-day control exercised by the public defense agencies generally includes hiring, internal structure of the agency, work assignments and promotions, setting of vacation schedules and most internal discipline, and management of funds provided by the County within the constraints of the County approved budget and contract.

67. This type of independence in day-to-day control over operations is normal for recognized units of King County government and it does not distinguish the public defense agencies from other County agencies. The Court finds compelling the testimony of Ricardo Cruz, the former director of King County's Office of Human Resource Management.

68. Cruz explained that the items of "independence" in operations relied on by the County as proving that the agencies were "independent contractors," including who to interview for a job, questions to ask potential hires, the decision of hiring and/or promoting, appointment of supervisors, decisions regarding internal structure, reorganization and assignment of work duties, were also in fact normal for recognized units of county government. He testified that because of the decentralization for personnel matters within King County government, the actual County agency departments and divisions operate with little significant difference from the public defense organizations, including the fact that there is nothing unique about two of the public defense

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organizations having collective bargaining agreements, since about 80 to 85% of the County's work force has collective bargaining agreements, including the prosecutor's office which has an agreement covering deputy prosecutors.

69. The day-to-day operational independence of the public defense agencies is thus not different from the operations of other King County agencies, including the Prosecutor's Office.

70. ~~Raymond Thoenig testified how the Department of Assigned Counsel operates and the control Pierce County exercises over it, and the public defense agency directors testified about how the public defense agencies operate and the County's control.~~

71. ~~This evidence is summarized in a chart based on WAC 415-02-110 and used by DRS in the *Robert B.C. McSeveney* decision to determine whether a worker is an employee for the purposes of PERS (DRS found that although Judge McSeveney signed an agreement providing that he was an independent contractor, not an employee, he was really an employee, not an independent contractor for PERS purposes). The chart is an appendix to the declarations of Robert Boruchowitz and Raymond Thoenig. The accuracy of the facts in the chart is attested to by Boruchowitz for the public defense agencies and King County panel attorneys and by Thoenig for the Pierce County Department of Assigned Counsel.~~

72. ~~This evidence shows that the County's control over the King County public defense agencies is the same or greater than that exercised by Pierce County over its Department of Assigned Counsel, a recognized unit of Pierce County government, and that the autonomy that the King County public defense agencies have in their internal operations is not different than that exercised by Pierce County's Department of Assigned Counsel. This evidence also shows that the County's control over public defense agency attorneys and staff and their work is the same as or greater than the control exercised by Pierce County over public defense attorneys and staff who are part of its Department of Assigned Counsel and who are enrolled in PERS by Pierce County.~~

73. The difference between Pierce County's Department of Assigned Counsel and the King County public defense agencies is a matter of corporate form because the public defense

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agencies are incorporated as nonprofits, while Pierce County's Department of Assigned Counsel is a recognized unit of County government.

74. ~~The agencies and public defense attorneys and staff are independent in their representation of clients, representing defendants with the same professional independence as do the Federal public defenders, and the Pierce County public defenders, all of whom are recognized as official government employees, but who are independent in their representation of clients.~~

75. Essentially the public defense agencies perform administrative functions for the County, managing public defense for King County in the same manner as other agencies that are officially part of County government, *e.g.*, Department of Assigned Counsel in Pierce County.

76. The County contracts with the agencies contain a number of provisions which the County contends are only "oversight" provisions, but the Court finds that these provisions – particularly when coupled with the other facts of control exercised by the County found by the Court – provide for control, not merely oversight, over the agencies and the plaintiffs.

77. The County annually or occasionally biennially contracts with the public defense agencies and the County defines each of them as an "agency" in the contract. The same contract is used for each of the agencies. In these contracts, King County sets the maximum number of cases an attorney may handle per year in each practice area each year. Kevin Dolan testified about how these caseload limits directly affect his work.

78. ~~King County may unilaterally change caseload limits mid-contract, for example lowering in midyear 2007 the number of cases an attorney may handle in juvenile court from 330 per year to 250 per year. The public defense agencies wanted to reduce attorney caseloads in the district court misdemeanor practice area where they thought the caseloads were too high, instead of the juvenile area, but the County did not agree and so the caseloads in juvenile practice area were lowered, requiring the public defense agencies to add or move attorneys to that practice area.~~

79. Under the contract, the Agencies are required to monitor each attorney's caseload to make sure they do not exceed the caseload limits and the County monitors agencies to assure

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their compliance with these limits. If a violation is found by the County, it may result in corrective action.

80. The County also states in the contract the percentage of cases and types of cases allocated by the County to each agency that occurred earlier in the budget process.

81. The agencies are required under the contract to keep track of the type of cases and to whom they are assigned. The agencies are required to submit monthly reports tracking the percentage of cases in each area that the agency has received.

82. The County requires the public defense agencies and all public defense attorneys, staff and board members comply with the King County "Employee Code of Ethics" ordinance, KCC §3.04, and incorporates this requirement in its contracts with the agencies.

83. The County also set appropriate staffing levels for support services. These are incorporated into the agency's contracts and budgets. The staff work under the public defense attorneys and their supervisors in defending the defendants assigned by the County.

84. The County maintains in its contracts and otherwise that the funds provided to the public defense agencies are solely for the purpose of providing public defense services for the County and cannot be used for any other purpose. (The County relied on this provision in its action against NDA.) ~~Similarly, the County maintains that any additional funding received by the agencies (if any), such as grant money, cannot be used to lower attorney caseloads or change the caseloads allocated by the contract.~~

85. The County provides funding for the agencies to purchase or lease equipment. This funding is built into the agency's budget by the County and incorporated into the contract. ~~(Before the County provided funding for such purchases, it gave the agencies County computers and furniture to use, and they remained the property of the County under the contract.) The County contracts require the agencies to maintain a detailed inventory of property purchased with funds from the contract or depreciated during the contract and state that any such property in excess of $1,000 belongs to the County (recently changed by the County to $5,000).~~

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86. ~~The contract requires the agencies to maintain a reserve account to be used solely to complete the agency's ongoing cases if the County ceases to use the agency as a public defense agency. The County maintains, in the event of termination, that any unexpended reserves belong to the County, not the agency.~~

87. The County required the agencies to submit several regular reports: position salary reports listing the salary of each of the lawyers and staff; monthly expenditure reports tracking the line items in the County-approved budget for the agency; monthly closed case reports; attorney case reassignment reports; reports about attorney evaluations; persistent offender reports; additional credit reports; complex litigation plans and time sheets; extraordinary case credits, and responses to client complaints, and any "additional summaries, reports or documents requested by OPD." These reporting requirements have been incorporated in the County contracts.

88. The contracts contain a corrective action procedure which applies if the County believes that the agency is not complying with the contract. Under this procedure, the County notifies the agency of the nature of the County complaint in writing, the agency has three working days to respond in writing with its corrective action plan to correct the deficiency specified by the County within 10 days. The County then notifies the agency whether the proposed correction has ~~in the sole discretion of the County~~ been accepted. If the agency does not satisfy the County with its corrective action, the County may terminate the contract, or continue to withhold payment. ~~Corrective action is a one way provision. There is no corresponding remedy for the agencies~~ if ~~they believe the County has not complied.~~

89. ~~The County has used the corrective action procedure to require the agencies to make changes in the agency's internal operations and functions. The County has used it to require the discharge of lawyers, managers, and board members, change bylaws and articles of incorporation, require changes to practice standards, experience standards, employee evaluations, supervision practices, and employee handbooks, adjust pay, and require work load adjustments.~~

90. The contract also authorizes the County to conduct audits of agencies' internal

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operations to assure compliance with the County's requirements. These audits are either by the County's Executive Audit services, or by OPD conducting a "site visit." These "site visits" are intensive audits to make sure that the agencies' internal operations comply, in the County's view, with all the County's requirements. If the County finds noncompliance by the agency, it uses its corrective action procedures to require the agency to make the changes to the agency's internal operations that the County deems necessary.

91. ~~The County provides the agencies with access to Electronic Court Records (ECR) equal to that provided to King County Prosecutors. Neither the public nor the King County panel attorneys have this access. The public defense agencies are also on the County's wide area network (WAN) and until recently all the public defense agencies used the County's e-mail system. The County requires the public defense agencies and all public defense attorneys and staff to comply with the County Information Management Policy, which governs County computer usage, and it incorporates this requirement into the contract. The agencies are also required to incorporate these County requirements into their employee handbooks and other materials distributed to employees.~~

92. ~~The County has promulgated the "Standards for Supervision" for the supervisory attorneys for the four public defense agencies, incorporating these standards into the agencies contracts and budgets. The County supervision standards require "one full-time equivalent supervisor for every ten staff attorneys," and provide that the "Supervisors shall not carry a caseload," with limited specified exceptions. *Id.* The County "standards for supervision" are detailed, setting forth three pages of specific requirements.~~

93. The County sets mandatory attorney qualifications for each practice area for each attorney classification. These are stated in the contracts and are also stated in the public defense attorney classifications that are incorporated into the Kenny scale.

94. The County requires that the agencies conduct annual attorney and staff performance evaluations and this requirement is part of the contract. The County reviews and

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approves the contents of the evaluation forms. The ~~County also establishes the method of the supervisors' evaluations of attorneys, requiring an individualized evaluation under the County's standard for attorney evaluations by supervisors.~~

95. The County promulgated a Standard for Client Complaints, formalizing the County's longstanding practice. This practice – now a standard – was incorporated into the contracts. Under this practice when a client complained to OPD, OPD would contact the agency, requiring the agency to respond to OPD in writing within 24 hours using an OPD form. ~~OPD has always treated the client complaints and agency responses as confidential because they may contain client confidence or privileged work product information.~~

96. The County has an "extraordinary occurrence policy" that the County incorporated into the agency's contracts. This policy requires the agency to report to OPD any time there is an allegation that an attorney or staff member has breached a professional duty owed to a client under "Constitutional Case Law" or "RPCs." The extraordinary occurrence can lead to corrective action by the County and ultimately to contract termination.

97. ~~The County sets mandatory tasks and schedules for task performance for individual public defense attorneys in the contracts. Kevin Dolan explained how these County requirements impact his work, requiring him to complete tasks within the County's schedule and make County-required notations in the client files.~~

98. ~~The County required the agencies to develop attorney practice standards. Using its corrective action procedures, the County made 32 pages of detailed changes to the standards that the agencies proposed. These practice standards are incorporated in the contract and failure to adhere to them is grounds for corrective action or contract termination.~~

99. Under the contract, the County exercises tight monetary control over death penalty, murder, and other complex cases through its control over case credits and expert witness fees. ~~In this context the King County Public Defender has told public defense attorneys that they should pursue a different defense, hire a different expert, or pursue a different strategy.~~

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100. King County exercises extensive control over its public defense agencies. It treats them as if they are County agencies or subagencies and the County acts like an employer and treats the plaintiffs as employees. The County is an employer of plaintiffs and plaintiffs are County employees for the purpose of PERS. King County's activities constitute control, not oversight.

101. Plaintiffs' claim is for enrollment in PERS, a state pension system for public employees authorized and defined in state statutes.

102. Plaintiff Kevin Dolan works as a County public defense attorney with ACA. ACA does not have a union, and ACA has never had an election to determine union representation.

103. SCRAP does not have a union. At one time, there was an election to determine representation, and union representation was rejected.

104. TDA and NDA have unions that represent employees. ~~TDA and NDA do not engage in meaningful bargaining with the unions over pay and benefits. TDA and NDA just pass through to the employees represented by the unions what funds the County provides.~~

105. The NLRB held elections at some (but not all) public defense agencies, after unions had filed petitions to certify unions and those public defense agencies had stipulated to elections. The NLRB election certifications did not decide whether attorneys and staff at TDA and NDA were public or private employees, nor whether TDA and NDA were public or private employers. The NLRB has not decided any jurisdictional issue or other issue relating to public defense agencies in King County.

106. Plaintiffs did not waive PERS benefits, nor are they estopped, by accepting occasional and usually employee-funded forms of retirement benefits. There is no evidence in the record of any knowing relinquishment by plaintiffs of a known right to PERS participation and no evidence supporting estoppel.

107. The Attorney General interpreted the PERS statutes in AGO 1955-57, No. 267, and found that the employees of a nonprofit corporation (Associated Students of the University of

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Washington) were eligible for PERS membership because the nonprofit corporation was an "arm and agency" of the University of Washington, an eligible PERS employer.

108. DRS's administrative interpretation of the PERS statute is the same as the Attorney General's. In a December 1990 PERS eligibility decision, DRS interpreted the term "employer" in PERS in the same manner as the Attorney General did in AGO 1955-57, No. 267. DRS adopted the Attorney General's interpretation as its own, and found that the employees of a nonprofit corporation, the Washington State University Bookstore, were correctly enrolled in PERS because the nonprofit corporation was an "arm and agency" of Washington State University, an eligible PERS employer.

109. ~~DRS found in an audit of King County – DRS Examination No. 96-20 – that workers who were paid by the County through independent businesses were County employees who should have been enrolled by the County in PERS. DRS's administrative interpretation of the PERS statute was that, even if the workers were also employees of the independent businesses, the County was at least a joint employer of the workers and that was sufficient for PERS.~~

CONCLUSIONS OF LAW

1. The Court incorporates as part of its conclusions of law the Court's February 9, 2009 written decision, which explains the legal basis for the Court's trial decision.

2. King County is a PERS employer and has a duty to enroll its employees in PERS and make PERS contributions to DRS.

3. The public defense agencies are the functional equivalents (alter egos) of King County and each is an arm and agency of King County.

4. King County is an employer of the plaintiffs and the plaintiffs are County employees for the purposes of PERS.

5. King County's affirmative defenses are rejected.

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DATED this 1 day of June, 2009.

JOHN R. HICKMAN
SUPERIOR COURT JUDGE

Presented by:

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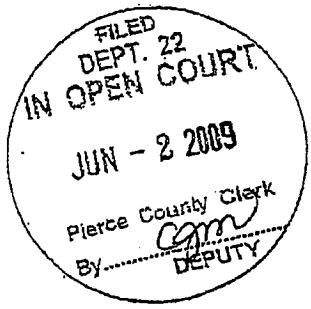

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KEVIN DOLAN, Plaintiff, vs. KING COUNTY, Defendant.	Cause No: 06-2-04611-6 ORDER REGARDING FINDINGS OF FACT AND CONCLUSION OF LAW

This matter having come before the above-entitled Court on two (2) separate hearings as to the presentment and/or need for findings of fact and conclusions of law as presented by counsel for KEVIN DOLAN, DAVID E. STOBAUGH and LYNN PRUNHUBER; KING COUNTY being represented by PHIL TALMADGE, AMY PANNONI, and MICHAEL REISS, respectfully objecting to the entry of any specific findings of fact and conclusions of law and argument being heard and briefs reviewed on the above two respective dates. The Court, having reviewed the material presented by counsel, as well as oral argument, and having reviewed the records and files contained herein, wherefore, it is hereby,

ORDERED, ADJUDGED and DECREED that pursuant to the terms of the Court's Written Decision entered by The Honorable John R. Hickman, on the 9th

day of February, 2009, that findings of fact and conclusions of law were required of the Plaintiff to be drafted at the Court's request.

In addition, the Court believes "findings" are necessary under CR 52 (a)(1), and the Court further adopts the case law and authorities cited by Plaintiff's counsel in their Memorandum of Authorities, dated 21st day of May, 2009, and incorporates said memorandum hereto.

It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff's motion to exclude defense counsel's objections/proposed amendments to Plaintiff's findings of fact and conclusions of law is denied.

It is further,

ORDERED, ADJUDGED and DECREED that the Court, in preparing the final findings of fact and conclusions of law, considered proposed pleadings from both Plaintiff's counsel as well as Defendant's counsel. The Court, in drafting its final findings of fact and conclusions of law, either interlineated additional wording or struck lines and/or paragraphs from the Plaintiff's proposed findings of fact and conclusions of law as the master model. In addition, the Court made a number of modifications as proposed by plaintiff and defense counsel as reflected in their proposed pleadings. The basis for the exclusions and/or failure to include modifications by plaintiff or defense counsel is based on a number of grounds:

1) That the proposed inclusions that were lined out in the Plaintiff's proposed pleadings were either argumentative or were not key factors in the Court's final decision as related in the Court's Written

Decision dated the 9th day of February, 2009. The fact that a paragraph is lined out shall not be interpreted as it being untrue. The Court lined out that paragraph simply because it was either argumentative or was not a key factor in the Court's Written Decision; and

2) The proposed findings as to either exclusion or failure to include recommended changes by the defense falls into the same category as either being argumentative or not key factors in the Court's lengthy Written Decision.

The Court notes that the material submitted by each party literally numbered in the thousands of pages and hundreds of exhibits and it would be impossible for the Court to prepare findings of fact and conclusions of law as to every point argued by either side. Therefore, the lengthy written decision that was issued by the Court, and the attached findings of fact and conclusions of law, constitutes the main basis for the Court's ultimate decision.

DATED this 2 day of June, 2009.

FILED
DEPT. 22
IN OPEN COURT
JUN - 2 2009
Pierce County Clerk
By DEPUTY

JUDGE JOHN R. HICKMAN

THE HONORABLE MICHAEL C. HAYDEN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TED WHITE, a single person, Plaintiff, v. NORTHWEST DEFENDERS ASSOC., a private corporation, doing business primarily in King County, Washington; et al. Defendants.	NO. 94-2-09128-0 ORDER GRANTING SUMMARY JUDGMENT TO KING COUNTY OFFICE OF PUBLIC DEFENSE ~~[PROPOSED]~~ NOTED FOR HEARING FRIDAY, DECEMBER 2, 1994 11:00 A.M.

The Court has considered the King County Office of Public Defense's Motion for Summary Judgment and the arguments and submissions of the parties, including:

1. Memorandum in Support of Defendant King County Office of Public Defense's Motion for Summary Judgment;

2. Declaration of James Crane in Support of Defendant King County Office of Public Defense's Motion for Summary Judgment;

3. Declaration of Rufus McKee in Support of Defendant King County Office of Public Defense's Motion for Summary Judgment;

12-02-94 MD
cc: McKee
Crane
Stein

DAVIS WRIGHT TREMAINE
Law Offices
2600 Century Square • 1501 Fourth Avenue
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(206) 622-3150 • Fax: (206) 628-7699

4. Declaration of Henry E. Farber in Support of Defendant King County Office of Public Defense's Motion for Summary Judgment, with excerpts from Deposition of Ted White attached;

5. Plaintiff's Memorandum in Opposition to Defendant King County Office of Public Defense's Motion for Summary Judgment, with all attachments;

6. Reply Brief in Support of Defendant King County Office of Public Defense's Motion for Summary Judgment; and

7. All other matters and pleadings of record in this case.

Based on the Court's review of the entire record before it, the Court finds that, according to applicable Washington law, the King County Office of Public Defense is entitled to summary judgment as a matter of law based on the following:

~~1. It is without genuine issue of material fact that plaintiff was replaced by a Caucasian and that he cannot establish a prima facie case of discrimination.~~

2. It is without genuine issue of material fact that the King County Office of Public Defense was not plaintiff's employer.

3. It is without genuine issue of material fact that the King County Office of Public Defense is not responsible for the allegedly discriminatory acts of Northwest Defenders Association.

For all the foregoing reasons, the Court finds the King County Office of Public Defense's motion to be well taken and

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IT IS HEREBY

ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

The King County Office of Public Defense's Motion for Summary Judgment is granted as follows:

1. ~~Plaintiff shall take nothing on his claim for discriminatory termination. All other claims having been previously dismissed, judgment shall be entered for the King County Office of Public Defense and against plaintiff.~~

2. ~~The King County Office of Public Defense shall recover from plaintiff its costs of suit.~~ $ 3,161 statutory costs.

DONE IN OPEN COURT this 2 day of December, 1994.

HONORABLE MICHAEL C. HAYDEN

PRESENTED BY:

DAVIS WRIGHT TREMAINE
Attorneys for Defendant
King County Office of Public Defense

By _____
Henry E. Farber, WSBA #18896
Carolyn J. Glenn, WSBA #19754

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COPY

FILED
LODGED
ENTERED
RECEIVED

MAY 20 1999

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK LARRANAGA, et al.,

Plaintiffs,

vs.

NORTHWEST DEFENDERS ASSOCIATION,

Defendant.

NO. C99-330Z

ORDER OF DISMISSAL

The Court has before it defendant's motion to dismiss, docket no. 31, and plaintiffs' motion to amend, docket no. 33. The Court has considered the papers and pleadings submitted by the parties in support of and in opposition to the motions and being fully advised, enters the following Order.

1. Based on the arguments of counsel and the papers and pleading submitted, the Court finds that plaintiffs' First Amended Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Specifically, the Court finds that plaintiffs' claims arguably allege unfair labor practices under the National Labor Relations Act, 29 U.S.C. § 151 et seq., and are therefore preempted by federal labor law. San Diego Bldg. Trades Council v. Garman, 359 U.S. 236 (1959). In addition, the Court finds that plaintiffs have failed to state a claim for breach of a collective bargaining agreement because they have not pleaded necessary elements of such a claim.

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2. Plaintiffs' motion to amend complaint is also denied as futile. Plaintiffs' proposed Second Amended Complaint would also have to be dismissed as preempted by either the National Labor Relations Act or Section 301 of the Labor Management Relations Act.

Accordingly, it is hereby ORDERED that:

1. Defendant's motion to dismiss is GRANTED;

2. Plaintiffs' motion to amend is DENIED;

3. Plaintiffs' First Amended Complaint is DISMISSED with prejudice; and

4. Judgment shall be entered for defendant forthwith.

IT IS SO ORDERED.

DATED this 20th day of May, 1999.

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

FILED ENTERED
LODGED RECEIVED

UNITED STATES DISTRICT COURT
Western District of Washington

MAY 24 1999

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

JUDGMENT IN A CIVIL CASE

MARK LARRANAGA, et al.

v. CASE NUMBER: C99-330Z

NORTHWEST DEFENDERS ASSOCIATION

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

Defendant's motion to dismiss is GRANTED;

Plaintiffs' motion to amend is DENIED;

Plaintiffs' First Amended Complaint is DISMISSED with prejudice; and

Judgment is hereby entered for defendant.

BRUCE RIFKIN, Clerk

May 24, 1999
Date

By Casey Condon
Casey Condon
Deputy Clerk